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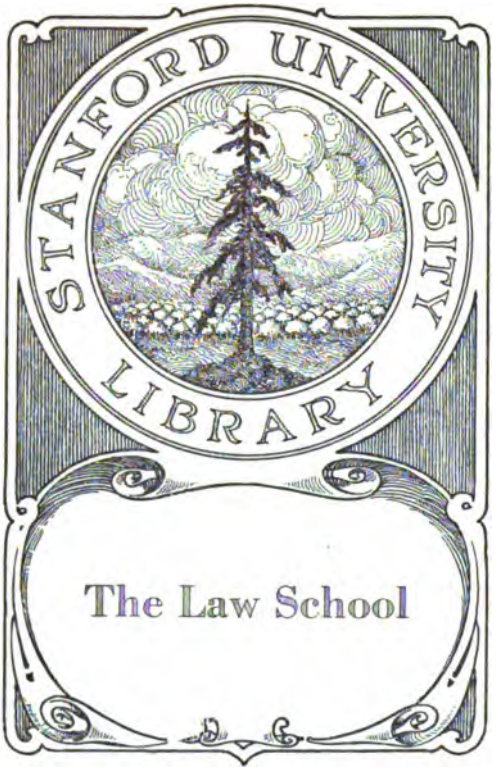

The Law School

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THE

LAW

OF

CONTRACTS AND AGREEMENTS

Not Under Seal.

VOL. II.

A

TREATISE

OF THE

LAW

RELATIVE TO

CONTRACTS AND AGREEMENTS

Not Under Seal,

WITH CASES AND DECISIONS THEREON
IN THE ACTION OF ASSUMPSIT.

IN FOUR PARTS.

By SAMUEL COMYN, Esq.
OF THE MIDDLE TEMPLE,
BARRISTER AT LAW.

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THE

LAW OF CONTRACTS.

PART THE THIRD.

OF

PARTICULAR CONTRACTS AND AGREEMENTS, WITH REFERENCE TO THE ACTION OF ASSUMPSIT.

The ſubject matter of a contract or agreement is either to pay money, or do or forbear a particular act. In this part of the work, therefore, it is intended, with reference to the action of *aſſumpſit*, to treat of the following ſubjects: viz.

1. *Of Money Had and Received.*
2. *Of Money Lent and Advanced.*
3. *Of Money Paid.*
4. *Of an Account ſtated.*
5. *Of Intereſt.*
6. *Of Contracts of Sale of Goods, &c.*
7. *Of Agreements to Accept, Transfer, or Replace Stock.*

8. *Of Contracts of Warranty.*
9. *Of the Bailment of Goods to Carriers, Wharfingers, Warehouſemen, and others.*
10. *Of Agreements to deliver up Securities, &c.*
11. *Of Contracts for Neceſſaries.*
12. *Of Services and Works.*
13. *Of Contracts to Marry, or to Pay Money in Conſideration of Marriage.*
14. *Of Agreements to Pay Money, &c. in Conſideration of Forbearance, or of Diſcharging a Precedent Debt, &c.*
15. *Of Agreements for the Relinquiſhment or Sale, &c. of Offices.*
16. *Of Agreements in Reſtraint of Trade.*
17. *Of Agreements not to take Advantage of a Communication of the Particulars of a New Invention, &c.*
18. *Of Wagers.*
19. *Of Bonds made in Scotland, not under Seal.*
20. *Of Contracts for Uſe and Occupation of Houſes, &c.*
21. *Of Contracts to Take and to Repair Houſes, &c.*
22. *Of Tithes bargained and ſold; and of Agreements for a Compoſition in lieu of Tithes.*

CHAPTER

CHAPTER I.

Of Money Had and Received.

IF a perſon has had and received money, or ſomething which has been converted into money, belonging to another, without any valuable conſideration given on the receiver's part, the law conſtrues this to be money had and received for the uſe of the owner only, and implies that the perſon ſo receiving promiſed and undertook to account for it to the true proprietor. And if he unjuſtly detains it, an action of *indebitatus aſſumpſit* lies againſt him, for the breach of ſuch implied promiſe and undertaking; and he will be made to repair the owner in damages, equivalent to what he has detained, in violation of ſuch his promiſe. Mr. Juſtice *Blackſtone* obſerves (*a*) "that this action is a very extenſive and beneficial remedy, applicable to almoſt every caſe where a perſon has received money which *ex æquo et bono* he ought to refund." Great benefit alſo ariſes from this ſpecies of action becauſe the charge and defence are both governed by the true equity and conſcience of the caſe (*b*). And in this form of action the plaintiff is not obliged to ſet forth in pleading the ſpecial circumſtances from which he concludes, "that, *ex æquo et bono*, the money received by the defendant, ought to be deemed as belonging to him: he may declare generally, "that the money was received to his uſe;" and make out his caſe at the trial (*c*). This is equally beneficial to the defendant. It is the moſt favourable way in which he can be ſued: he can be liable no further than the money he has received (*d*); and againſt *that*, may go into every equitable defence, upon the general iſſue: he may claim every equitable allowance; he may prove a releaſe without pleading it: in ſhort he may defend himſelf by every thing which ſhows that the plaintiff, *ex æquo*

(*a*) 3 *Bl. Com.* 163. (*b*) *Doug.* 138.

(*c*) *Per Lord* Mansfield. 2 *Bur.* 1010.

(*d*) 4 *Bur.* 2134. *and* 1 *Boſ. & Pul.* 306. *and* 2 *Boſ. & Pul.* 472, *where it was held that the net ſum only, without intereſt, can be recovered. But ſee* 2 *Bl.* 1078. *& Poſt.*

& bono, is not entitled to the whole, or any part of his demand *. The courts, however, take care that this general mode of pleading do not turn to the prejudice of the defendant. And, therefore, this form of action will not lie, where it would throw the burthen of ſpecial pleading from the plaintiff upon the defendant, or where it would ſubject him to uncertainty as to the point to which he ſhould direct his defence; or where it would trench upon eſtabliſhed forms, or otherwiſe produce inconvenience upon principles of legal policy (*e*).

The caſes on this ſubject are ſo very numerous and various, that I have found it neceſſary to claſs them in the following order:

1. *Of Money had and received for a particular Purpoſe; and of Money owing to one Perſon, but directed by him, and aſſented to by the Debtor, to be paid to a third Perſon.*
2. *Of Money had and received upon or in reſpect of Bills of Exchange, Promiſſory Notes, &c.*
3. *Of Money had and received upon Goods, &c. which have been converted into Money.*
4. *Of Money had and received by or from Agents; and of Money depoſited with Stake-holders, &c.*
5. *Of Money had and received by Revenue Officers, either by Miſtake or* malâ fide.
6. *Of Money had and received by Sheriffs, Gaolers, and their reſpective Officers, &c.*
7. *Of Money paid or received by Miſtake, or Deceit, between private Individuals; and of voluntary Payments, &c.*
8. *Of Money had and received under legal Proceſs, &c.*
9. *Of Money had and received under a void Authority, whether judicial or otherwiſe.*
10. *Of Money had and received upon a Conſideration which has failed, or upon a Contract which has been reſcinded, or not performed, &c.*
11. *Of Premiums received upon Marine Inſurances.*
12. *Of Money had and received upon illegal Contracts and Agreements, &c.*
13. *In what Caſes this Form of Action lies to try the Right to an Office, or to Fees in reſpect thereof; and alſo for Prize Money, &c.*

* 2 *Bur.* 1010. (*e*) *Cowp.* 414. 818. 4 *Bur.* 1984; & *vide poſt.*

1. *Of*

1. *Of Money had and received for a particular Purpoſe: and of Money owing to one Perſon and directed by him, and aſſented to by the Debtor, to be paid to a third Perſon.*

The general rule is ſaid (*f*) to be that if a man receive money which ought to be paid to another or be applied to a particular purpoſe, but to which he does not apply it, this action will lie as for money had and received. Thus, if money be delivered by A. to B. to buy a horſe or any other thing, if he do not lay out the money accordingly, an action of debt, or an action on the caſe, will lie for ſo much money, had and received to A's uſe (*g*).

So in the caſe of *Poulter* v. *Cornwall* (*b*) it was held that if a man receive money for a ſpecial purpoſe, and neglect or refuſe to apply it to the uſes for which he received it, an action on the caſe will lie as for money had and received. And it is obſerved, (*i*) that "though a bill in equity may be proper in ſeveral of theſe caſes, yet an action at law will lie likewiſe; as if I pay money to another to lay out in the purchaſe of a particular eſtate or any other thing, I may either bring a bill againſt him conſidering him as a truſtee, and praying that he may lay out the money in that ſpecific thing, or I may bring an action againſt him as for ſo much money had and received for my uſe."

So, if A. delivers money to B. to be paid over to C. the latter may recover it of B. by action of *indebitatus aſſumpſit* for money had and received for the uſe of C (*k*).

It is a general rule of law that choſes in action are not aſſignable. And therefore where a perſon, entitled to money due from another, aſſigns over his intereſt in it to a third perſon, the mere act of aſſignment does not entitle the aſſignee to maintain an action for it. The debtor may refuſe his aſſent: he may have an account againſt the aſſignor, and wiſh to have his ſet-off. But if there be

(*f*) *Per* Willes, *Ch. J. Willes Rep* 404. (*g*) *Owen*, 86.
(*b*) 1. *Salk*. 9. (*i*) *Per* Willes, *Ch. J. Willes Rep*. 405.
(*k*) 1. *Rol. Abr*. 7. *pl*. 2. *See alſo* 1 *Rol. Abr*. 27. *pl*. 51. *It*. 32. *pl*. 13. 1 *Ventr*. 153. 1 *Boſ. & Pul*. 296.

an aſſent or promiſe on the part of the debtor or holder of the money, in that caſe it has been holden (*l*), that the action of *indebitatus aſſumpſit* for money had and received, is maintainable.

So, in the caſe of *Ward* v. *Evans* (*m*), which was an action of *indebitatus aſſumpſit* for 60*l.* received by the defendant to the uſe of the plaintiff. The facts were as follow: one *Fellows*, a merchant, who kept his caſh with the defendant *Sir Stephen Evans*, a goldſmith, in *Lombard Street*, was indebted to the plaintiff in 60*l.* 10*s.* the plaintiff ſent his ſervant to receive the money of *Fellows*, who ordered his ſervant to pay *Ward*'s man the money at *Sir Stephen Evans*'s. Accordingly both the ſervants went to *Sir Stephens Evans*'s ſhop, and there *Fellows*'s ſervant directed the defendant's ſervant, to pay *Ward*'s ſervant the 60*l.* 10*s.* and to indorſe it on a note of 100*l.* from the defendant to *Fellows*, in part of payment of the 100*l.* The defendant's ſervant accordingly indorſes 60*l.* 10*s.* as paid on the ſaid note of 100*l.* and then paid 10*s.* to *Ward*'s ſervant, and gave him a note ſubſcribed by one *Wallis* a goldſmith, for 60*l.* payable to one *Freeman*, or bearer, which the plaintiff's ſervant accepted. This tranſaction was about noon, and at that time *Wallis* was a ſolvent perſon, and continued paying his bills till night. Next morning the plaintiff's ſervant coming with the note to receive the 60*l.* of *Wallis*, found that *Wallis* had ſtopped payment, and was become inſolvent. Whereupon the plaintiff brought this action againſt the defendant for the 60*l.* note: it did not appear upon the evidence, that the plaintiff was conuſant of, or privy to this tranſaction of his ſervant, or had given him any authority to receive a note inſtead of money, or approved of it afterwards.

Holt, Ch. J. ſaid: "I am of opinion that an *indebitatus aſſumpſit* for monies received to the plaintiff's uſe lies properly in this caſe, and that this evidence is ſufficient to maintain the plaintiff's declaration. For when the 60*l.* was indorſed on *Fellows*'s bill, as ſo much actually paid by *Sir Stephen Evans* to *Fellows*, *Fellows* directing that ſum to be paid to the plaintiff, and the defendant

(*l*) *Per Lord* Ellenborough. 4 *Eſp. Rep.* 204.

(*m*) 2 *Ld. Raym.* 928. 6 *Mod.* 36. 1 *Salk.* 442. & *Holt*, 120, *S. C.*

having

having the money in his hands, it amounts to a receipt of ſo much by the defendant to the plaintiff's uſe. No doubt the action were maintainable, if the plaintiff had brought the note back again to the defendant, and though he did not, ſince it does not amount to actual payment, the plaintiff muſt recover."

Powel, J. "This evidence will maintain the declaration, for *Fellows*'s caſh remaining in the defendant's hands, when by the indorſement the defendant is diſcharged from ſo much of *Fellows*'s note as againſt him, that money being to be paid by his direction to the plaintiff, it is a receipt by the defendant to the plaintiff's uſe. The delivery and acceptance of *Wallis*'s note is no payment, for when a maſter ſends his ſervant to receive money, he cannot accept a note in lieu of it. Perhaps, if the maſter had been there himſelf, he would have refuſed the note, as knowing the inſufficiency of *Wallis*; and ſhall the ſervant oblige him to take ſuch a note by his acceptance without his maſter's directions? Indeed if the maſter conſents to it afterwards, that amounts to a previous command." Judgment for the plaintiff, *per totam curiam.*

So, in the caſe of *Iſrael* v. *Douglas* and another, (*n*) which was alſo an action of *indebitatus aſſumpſit*. The declaration contained four counts. 1. Money had and received. 2. Money paid. 3. Money lent. 4. An account ſtated. The material facts of this caſe were as follow: the defendants who were partners, were indebted to one *Delvallé*, a broker, in 64*l.* 9*s.* for brokerage, and *Delvallé* was indebted to the plaintiff in 40*l.* on a promiſſory note. *Delvallé* afterwards applied to the plaintiff, to lend him a further ſum, which the plaintiff refuſed to advance without ſecurity; whereupon *Delvallé*, gave him an order on the defendant for the ſum in which they were indebted to him (*Delvallé*) for brokerage. This order was ſent by the plaintiff to the defendants in *November* 1787, with a requeſt that they would acknowledge their having given him credit for it. The defendant *Douglas* anſwered, that they would pay the money which they owed to *Delvallé*, to no other perſon but the plaintiff, but objected to the amount of the ſum contained in the order, which they deſired to have rectified.

(*n*) 1 *H. Bl.* 239. *But ſee the caſe of* Taylor v. Higgins, 1 *Eaſt Rep.* 171. *where the authority of this caſe is queſtioned. See alſo* 1 *Eaſt. Rep.* 104.

Another order was then ſent to them, which *Douglas* again objected to, promiſing at the ſame time to pay the plaintiff, what they really owed to *Delvallé*, and requeſting an order to pay or give credit to the plaintiff, for ſo much in their hands, as was in fact due to *Delvallé*. An order in this form was accordingly ſent them, which they accepted; in conſequence of which, the plaintiff advanced 70*l.* to *Delvallé*; who afterwards becoming a bankrupt, the defendant refuſed to pay the money to the plaintiff according to the order. On which refuſal this action was brought.

Upon the trial the plaintiff obtained a verdict; againſt which a rule was obtained to ſhow cauſe, why it ſhould not be ſet aſide, and a new trial granted.

But, after argument, all the judges of the court of *common pleas* (except Mr. Juſtice *Wilſon*) were of opinion that the evidence ſupported the count for money had and received.

Lord Loughborough, Ch. J. ſaid, "The point made at the trial was, that the plaintiff had miſconceived his action. Now where a party has not the ſubſtantial juſtice of the caſe on his ſide, the court will not favour any action which he may bring. But where juſtice is clearly with him, they will, if poſſible, allow him to maintain the action he has brought; becauſe the only effect of a refuſal would be to make him adopt another form of action. In the preſent caſe, it is admitted that the plaintiff has the law with him in ſome action. But it has been argued, that *Delvallé* ought to have brought the action. Yet I cannot conceive why that ſhould prevent the plaintiff from having his remedy. It was alſo ſaid, that *Delvallé's* action ſhould have been for work and labour. But to admit this, we muſt ſtrain a point, and ſuppoſe that *Delvallé* had really performed work and labour for the defendants. For in general, the demand which a broker has upon his employer, is for the difference of money on account between them for premiums, &c; ſo that if he were to reſt ſolely on a count in his declaration for work and labour, without the common money counts, he would be in danger of a nonſuit. It was farther contended, that the money was in point of fact owing by the defendants to *Delvallé*, that their undertaking was to him, that in reality no money was had and received by them to the uſe of the plaintiff. But *Delvallé* had paid for premiums on account of the defendants, which created a debt from them, and which he might have ſet off againſt any

any ſimilar demand of theirs againſt him. This debt is, with the conſent of the parties, aſſigned to the plaintiff. *Douglas* has due notice of it, and aſſents; by which aſſent he becomes, with his partner, liable to the plaintiff. He makes no objection to an order from *Delvallè* to pay his money to the plaintiff, but only to the amount of the ſum to be paid. He inſiſts that the whole demanded by *Delvallè* was not due, and therefore requires a looſer order, on the faith that he would pay the balance: on his failure to pay, his promiſe attached, ſo as to make the defendants liable to an action.

Then the queſtion is, whether when *Iſrael* brings an action in his own name againſt the defendants, this ſhall not be conſidered as money had and received by them to his own uſe? Now when *Douglas* had admitted the money to be due, he was that moment eſtopped, as it were, from ſaying that it was not due, I alſo think the action might be maintained on the account ſtated. *Delvalle* gives an order to pay to the plaintiff a liquidated balance; the only diſpute is concerning the amount of that balance. *Douglas* ſays "I will pay you according to the ſum which ſhall appear to be due." He is here again eſtopped from denying the effect of his promiſe. I am therefore of opinion, that the verdict is right, and ought not to be ſet aſide."

Gould, J.—"This caſe is like that of a man having money due to me in his hands, which I order him to pay to another. Now if I pay money to you for another perſon, it is money had and received by you to his uſe. But where is the real and ſubſtantial juſtice, whether I in fact pay money to you for a third perſon, or whether I give you an order to pay ſo much money, to which you expreſsly aſſent? In reaſon and ſound law, it is money had and received to the uſe of ſuch third perſon. If my debtor tenders me money, which I give back to him, and tell him to pay to another, he then in point of fact receives money to the uſe of the other. But is there any real difference, between ſuch a caſe and the preſent? As to the account ſtated, I think that count alſo, all the circumſtances conſidered, comes within the fair compaſs of the caſe; but I have not the leaſt doubt as to the count for money had and received."

Heath, J.—"I think in mercantile tranſactions of this ſort, ſuch an undertaking may be conſtrued to make a man liable for money had and received."

Wilſon,

Wilſon, J.—" It is highly neceſſary that the forms of actions ſhould be kept diſtinct. Courts of juſtice have, in my opinion, already gone quite far enough, in extending the favourite count, for money had and received. But I know of no caſe, where they have gone ſo far as to allow that count to be maintained where no money has in fact been received by the defendant. Here it by no means appears that money was had or received by the defendants. I am alſo of opinion that this demand between the parties, being for brokerage, was from the nature of it, the ſubject of an action for work and labour. Now though it be true, that where a man is my debtor, he holds my money, yet I cannot accede to this as a general propoſition, that whenever a man is my debtor, I am intitled to bring an action againſt him for money had and received. A taylor might, according to this rule, bring an action for money had and received, againſt a man who had not paid him for a ſuit of cloaths. For my idea is, that where no money has been actually had and received, no action for money had and received can be ſupported. In the caſe of *Fenner* v. *Meares*, money was in fact received by the defendants; there the action might clearly be maintained. So here it would have been proper, if it could be ſhown, that that money was received by *Douglas* to the uſe of *Delvallé*.

In the caſe of *Fenner* v. *Meares* (*p*), above referred to, it was determined that this form of action lies by the aſſignee of a *reſpondentia* bond againſt the obligor, where the latter, by an indorſement made thereon engaged to pay the ſame to any aſſignee.

On the trial of this cauſe it appeared, that the defendant *Charles Meares* was captain of the *Egmont Eaſt Indiaman*, and on the 26th of *December*, 1776, borrowed of *James Cox* 1000*l.* upon two *reſpondentia bonds* of 500*l.* each, and in the preſence of *Cox* ſigned thereon the following indorſement:

" I the underwritten do hereby declare, that the within bond " granted by me to the within named *James Cox*, is not ſubject " to any article or articles of agreement, or to any ſet-off whatever; " but that if in caſe the ſaid *James Cox* ſhall chuſe to aſſign it to " any perſon or perſons, I do hereby acknowledge, that I hold

(*p*) 2 *Bl. Rep.* 1269. *The authority of this caſe is doubted by Lord* Kenyon, *in* 1 *Eaſt Rep.* 104.

" myſelf

" myſelf bound to pay unto ſuch aſſignee or aſſignees thereof as " ſhall be duly appointed by him the ſaid *James Cox*, the whole " both of the principal and intereſt of the within bond, agreeable " to the tenor thereof, without any deduction or abatement " whatſoever."

This indorſement was calculated to make the bond aſſignable abſolutely, and to prevent *Meares* from ſetting off what might be due in account from *Cox* to him.

On the 22d of *January*, 1777, *Fenner* advanced money to *Cox* upon an aſſignment of theſe bonds, and a covenant from *Cox* that he had a good title to aſſign, and would be a ſurety for the payment of the money that ſhould be due thereon. In the mean time the ſhip ſailed for *India*, and returned back in *May* 1778 to *England*, when the plaintiff, *Fenner*, ſent a meſſage by one *Evans* to the defendant *Meares*, acquainting him with the aſſignment, and requeſted payment of the money. *Meares* deſired time, and begged that the plaintiff might not ſue him. But *Meares ſtill* delaying payment, this action was brought.

It was objected that this action was not maintainable, it being a debt on a *ſpecialty*. But *De Grey*, Ch. J. held it well brought, and verdict was found for the plaintiff for principal and intereſt. A new trial, however, was moved for, upon the above ground; but the court of *Common Pleas* determined that the plaintiff was entitled to recover in this form of action.

Blackſtone, J. ſaid: " As this is entirely a new queſtion, and I cannot upon ſo ſhort a conſideration foreſee all the conſequences attending it, I ſhall avoid giving any deciſive opinion upon it. I cannot, for inſtance, upon ſo tranſient a view, diſcern what effect might be derived to the aſſets of a perſon deceaſed, by thus turning a ſpecialty debt by aſſignment, into a ſimple contract. And from this caution, rather than from any great doubt attending this particular caſe, I chuſe to determine it upon plainer and more indiſputable grounds, ariſing from the evidence before us. The promiſe made by *Meares* to *Evans*, upon his return from India, is clearly an *aſſumpſit* to *Fenner*. It would be a ſufficient promiſe to avoid the ſtatute of limitations. And the aſſignment and other tranſactions are fully ſufficient as a conſideration to make that *aſſumpſit* binding. Upon that account it is therefore clear that a general *indebitatus aſſumpſit* will lie."

- *De Grey*, Ch. J- "At the trial I gave an opinion that in point of law this action was maintainable; and I have ſeen no reaſon to change it. Were I now ſilent, it might be thought I had. But I am ſtill ſatisfied that the action will be abſtracted of the particular evidence, on which my brother *Blackſtone*' founded his opinion. Reſpondentia bonds have been found eſſentially neceſſary for carrying on the Indian trade. But it would clog theſe ſecurities, and be productive of great inconvenience, if they were obliged to remain in the hands of the firſt obligee. This contract is therefore deviſed to operate upon ſubſequent aſſignments; and amounts to a declaration, that upon ſuch aſſignment the money which I have ſo borrowed ſhall no longer be the money of A., but of B., his ſubſtitute. The plaintiff is certainly intitled to the money in conſcience, and therefore (I think), intitled alſo at law: for the defendant has promiſed to pay any perſon that ſhall be intitled to the money."

But, in the caſe of *Crifford* v. *Berry* (*q*), which is reported as follows: wages are due to A. from the *Eaſt India Company*, he ordered B. to receive the money, and pay it to C., to whom he was indebted: C. brings an *indebitatus aſſumpſit* againſt B."

At the trial, at *Guildhall*, *Holt*, Ch. J. ſaid, that the action could not be maintained by C.; whereupon the plaintiff was nonſuit."

2. *Of Money had and received upon or in reſpect of Bills of Exchange, Promiſſory Notes, &c.*

An action of *indebitatus aſſumpſit*, for money had and received lies by the *bonâ fide* bearer of a note, payable to bearer, againſt the maker.

Thus, in the caſe of *Grant* v. *Vaughan* (*r*), which was an action of *indebitatus aſſumpſit*. The declaration contained two counts: one upon an inland bill of exchange; the other, an *indebitatus aſſumpſit* for money had and received. The facts were as follow: The defendant, a merchant in *London*, gave a caſh note upon his banker, to one *Bicknell* a huſband of a ſhip of his: which note

(*q*) 11 *Mod.* 241. (*r*) 3 *Bur.* 1516.

was

was dated, "*London*, 22d of October, 1763," and directed to *Sir Charles Asgill*, who was *Vaughan*'s banker, and was worded thus: —"Pay to ship *Fortune*, or bearer," so much. *Bicknell*, by some accident, lost this note. The person who found it, or who at least was in possession of it (however he might obtain that possession) came, four days after the note was payable in *London*, to the shop of *Grant*, the plaintiff, who was a tradesman at *Portsmouth*, and bought five pounds worth of tea of him, and gave him this note in payment, desiring to have the change out of it. *Grant*, (the plaintiff) stept out to make inquiry who this *Vaughan* might be; and upon being informed that he was a very good man, and that it was his hand writing, he readily gave the change out of the note, retaining the price of the tea. *Vaughan*, upon being apprized that *Bicknell* had lost the note, sent notice to *Sir Charles Asgill*, "not to pay it." Whereupon *Grant*, being refused payment, brought his action, and the Court of *King's Bench* determined that the plaintiff was entitled to recover upon the count for money had and received.

Lord *Mansfield*, Ch. J. said: "Upon the second count, the present case is quite clear, beyond all dispute. For, undoubtedly, an action for money had and received to the plaintiff's use, may be brought by the *bonâ fide* bearer of a note made payable to bearer. There is no case to the contrary. It was certainly money received for the use of the original advancer of it: and if so, it is for the use of the person, who has the note as bearer. In this case, *Bicknell* himself might undoubtedly have brought this action. He lost it: and it came *bonâ fide*, and in the course of trade, into the hands of the present plaintiff, who paid a full and fair consideration for it. *Bicknell* and the plaintiff are both innocent. The law must determine whether of them is to stand to the loss: and by law, it falls upon *Bicknell*."

So the indorsee of a promissory note may maintain the like form of action against the maker, to recover the amount of a forged note given in part payment.

Thus, in the case of *Dimsdale* and others v. *Lancheſter*, (*s*) which was an action of *indebitatus assumpsit* for money paid and had and received; and on the trial, it appeared in evidence, that the defendant having given her promissory note for 63*l.*, it was paid into

(*s*) 4 *Esp. Rep.* 201

the hands of the plaintiffs, who were bankers; the payee having regularly indorſed it. The note was ſent to the defendant by a notary for payment; and in payment of it, he received, in part, a 10*l.* note, which turned out to be a forgery, to recover the amount of which, the preſent action was brought.

The counſel for the defendant objected that the plaintiffs, being indorſees of the firſt note, ought to have declared thereon as indorſees, and given notice to the defendant to produce it upon the trial: and as the only dealing was through the medium of that note, there was no money of the plaintiffs had and received by the defendant.

Lord *Ellenborough*, Ch. J. before whom the cauſe was tried, ſaid, he thought the action was maintainable: that when a perſon has put his name to a promiſſory note, he thereby acknowledges that he has money in his hand of the payee of the note; and undertakes to pay it to whoever is legally entitled to receive it; that is, to the perſon who ſhall have paid for it a good conſideration, and who has thereby become the legal holder of the note.

So, in the caſe of *Tatlock* v. *Harris* (*t*), which was an action at the ſuit of the indorſee of a bill, payable to a *fictitious payee*, againſt the acceptor, who was alſo one of the drawers; the declaration contained counts for money paid, and for money had and received. It appeared upon the evidence, that the defendant was indebted to one of the indorſers, and ſent him this bill, for which he was credited in account, and that the plaintiff paid that indorſer the value of the bill: and upon a demurrer to the evidence, the Court of *King*'s *Bench* held that the plaintiff was entitled to recover under the counts for money paid, and money had and received, and he had judgment accordingly.

So, in the caſe of *Vere* v. *Lewis* (*v*), which was a ſimilar action to the laſt, except that the defendant was not one of the drawers, and there was no evidence that he received any value for the bills; upon which it was urged the plaintiff could not recover upon the money counts; but the court ſaid the acceptance was evidence that he had received value from the drawers, and the plaintiff had judgment.

(*t*) 3 *Term Rep.* 174. *See alſo* 1 *H. Bl.* 313. & 569.
(*v*) 3 *Term Rep.* 182.

So,

So, in the caſe of *Pierſon* v *Dunlop and others*, (*u*) it was determined, that if the indorſee of a bill of exchange who has received a navy bill aſſigned to the drawee, as a ſecurity to him (the indorſee) till the bill of exchange is accepted, depoſit ſuch navy bill with the drawee, and the drawee receives the money upon it, he is anſwerable for the amount in an action for money had and received to the uſe of the indorſee, though he may have done nothing that amounts to an acceptance of the bill of exchange.

So, in the caſe of *Whitfield* v *Savage*, (*w*) which was alſo an action of *indebitatus aſſumpſit* for money had and received. The circumſtances of the caſe were as follow: A perſon of the name of *Dibdin* being in want of 50*l.* applied to the plaintiff for the loan of that ſum, who gave him a bill for 55*l.* 6*s.* drawn by himſelf upon one *Thornton*, and accepted by the latter. *Thornton* had effects of the plaintiff in his hands to the amount of the bill. *Dibdin* indorſed the bill to the defendant, from whom he received the full amount, and the defendant indorſed it over to another perſon. The day before the bill became due, *Dibdin* took 50*l.* in part payment of his debt to the plaintiff, but ſoon after he had paid it into his hands, the plaintiff, in the preſence of *Dibdin*, being informed that *Thornton*, the acceptor, was become inſolvent, ſaid "that it would be of no uſe for him to keep *Dibdin's* money, as he ſhould not like the bill to be returned upon him"; he therefore gave to *Dibdin* a check on his banker for 50*l.* (being the ſum which he had juſt before received of him) deſiring him to take it to the defendant: *Dibdin* accordingly gave the check to the defendant, together with 5*l.* 6*s.* of his own, to enable him to provide for the bill, telling him that *Thornton* had become inſolvent, and was gone off. Four days after the bill had become due, the plaintiff having learnt from the defendant, that payment of the bill had not been demanded, deſired him not to pay it, as no notice had been given by the holder, of its non-payment, and at the ſame time, promiſed to indemnify the defendant againſt the conſequences of a refuſal. Soon after this, the bill was brought to the defendant, who paid it notwithſtanding the caution he had received from the plaintiff: whereupon the latter brought this action to recover the 50*l.* paid to the defendant, to enable him to provide for the bill.

(*u*) *Cowp.* 571. (*w*) 2 *Boſ. & Pul.* 277.

The

The court of *Common Pleas* determined that the plaintiff was entitled to recover in this form of action.

Lord *Eldon*, Ch. J. ſaid: "With reſpect to the objection, that this action for money had and received, ought to have been brought by *Dibdin*, inſtead of the preſent plaintiff, it appears to me, that the action is well brought, for theſe reaſons. The night before the bill became due, the plaintiff ſent the money in diſpute to the defendant, it was the plaintiff therefore that advanced it. It is true, indeed, that *Dibdin* being the perſon liable in conſcience before either the plaintiff or defendant, had previouſly put 50*l.* into the plaintiff's hands; but as the money in diſpute was actually ſent by the plaintiff to the defendant, the former had a right to call upon the latter to reſtore it to him. As between the plaintiff and defendant the money may be conſidered as advanced by the plaintiff: and in what manner the plaintiff and *Dibdin* might ſettle between themſelves, does not concern this defendant. I ſhould think, as having actually advanced it, he had a right to recover it, even if after the recovery, he held it as a truſtee for *Dibdin*. In contemplation of law, the plaintiff has loſt the value of his effects in the hands of the acceptor; and it is on that principle that notice of non-payment is required. In contemplation of law, he muſt ultimately have been the loſer by the failure of the acceptor. He therefore depoſited the money with the defendant to anſwer the bill if duly demanded. But when the holder was no longer entitled to enforce payment of the bill, the money ſo depoſited muſt be conſidered as remaining in the defendant's hands, for the uſe of the plaintiff, and the defendant having taken upon himſelf to diſpoſe of that money in payment of the bill, after notice to abſtain from ſo doing, and after an offer of indemnity, is in law liable to anſwer to the plaintiff for the amount".

But a mere promiſe by a debtor to his creditor, that if he would draw a bill upon him, at a certain date, for the amount of his demand, he ſhould then have the money, and would pay it, does not amount in law to an acceptance of the bill when drawn: and an indorſee for a valuable conſideration, between whom and the drawee no communication paſſed at the time of his taking the bill, can neither recover upon the count as for an acceptance of the bill, nor on the general counts as for money had and received, &c. (*x*)

(*x*) Johnſon *v.* Collings, 1 *Eaſt Rep.* 98.

So,

So, where the drawee of a bill of exchange, upon its being preſented to him by the indorſee, accepted the bill, and ſaid, that he expected a remittance from the drawer in a few days, and that as he had a bill of the drawer in his hands which would be paid, he would take all riſks; theſe circumſtances do not amount to ſufficient evidence to entitle the indorſee to recover againſt the drawee the amount of the bill on a count for money had and received, after failing to eſtabliſh by evidence, the ſpecial count upon the bill.

Thus, in the caſe of *Whitwell* v. *Bennett*, (y) which was an action of *aſſumpſit*; and the firſt count of the declaration was on a bill of exchange for 30*l.* ſtated to have been drawn by one *John Crouch*, on the defendant, payable to the order of J. F. accepted by the defendant, and indorſed to the plaintiff; the ſecond count was on a banker's check; and the third count was for money had and received.

At the trial, the bill declared upon in the firſt count, when produced, appeared to be drawn by one, *John Couch*, inſtead of *John Crouch* as alledged: the check was alſo proved to have been poſt dated, and therefore void, (z) not being within the exemption of the 31 Geo. 3. c. 25. ſ. 4.

The plaintiff failing on both theſe counts, proved, that when the bill was preſented to the defendant, he accepted it, ſaying, that though *Couch* had not remitted to him, yet that he expected he would do ſo in a few days, and that as he had a bill of *Couch* in his hands for 80*l.* which would be paid, he would take all riſks upon himſelf, and accordingly gave the plaintiff the check in queſtion, poſt dated.

Upon this evidence the plaintiff's counſel contended, that the defendant was liable upon the count for *money had and received*: and this queſtion was reſerved for the opinion of the court of common pleas. But, after argument, the court determined, that the plaintiff could not recover upon that count.

Lord *Alvanley*, Ch. J. in delivering the opinion of the court, ſaid, "On the firſt and ſecond counts, the plaintiff is precluded from recovering, by objections in law taken on the part of the defendant, which are inſurmountable. The plaintiff, however, inſiſts that he is entitled to recover upon the count for money had and received. Upon that point, the queſtion for our conſideration ariſes on the converſation which paſſed between the parties at the time when the defendant accepted the bill drawn upon him by *Couch*, and of which

(y) 3 *Bos. & Pul.* 559. (z) *Vide* 1 *Eaſt Rep.* 435.

the plaintiff was indorſee. At that time the defendant told the plaintiff, that he expected remittances from *Couch*, and that as he had a bill for 80*l.* belonging to *Couch*, in his hands, which would be paid, he would run all riſks, and accordingly gave the plaintiff a check upon his banker. The queſtion then is, whether this declaration of the defendant's be not *primâ facie* evidence that the 80*l.* bill was paid? For, if that bill was paid, the action for money had and received would be maintainable, on the ground of the defendant's ſpecific appropriation of that money to the payment of the plaintiff's demand. It has been contended, that the above declaration of the defendant's, puts it upon him to ſhow that the bill was not paid. In ſupport of this propoſition, the caſe of *Longchamp* v. *Kenny* * was relied upon, where Lord *Mansfield* held, that the ſale of a ticket, and the receipt of the price by the defendant, might be preſumed againſt him unleſs he produced the ticket. But, in that caſe, there was abundant evidence out of the defendant's own mouth, that he had received the price of the ticket, till he proved the contrary. Indeed there was another circumſtance in that caſe, which diſtinguiſhes it from the preſent, *viz.* that the defendant there had complete notice of the queſtion which was to be tried between himſelf and the plaintiff, and could not be ſurpriſed by the form of the count under which the plaintiff recovered. In this caſe it was undoubtedly a ſurpriſe upon the defendant, for he came to trial prepared to reſiſt the counts upon the bill and check, and to ſhow that he never accepted the former. It would be going too far, therefore, to preſume, that becauſe the defendant did not produce the 80*l.* bill (which was not in queſtion) he muſt have received the amount. The caſe of *Longchamp* v. *Kenny*, therefore, is diſtinguiſhable from the preſent; and the plaintiff, whatever be the merits of his caſe, muſt be nonſuited".

3. *Of Money Had and Received upon Goods, &c. which have been converted into Money.*

If a perſon receives goods, &c. the property of another, and converts them into money, an action of *indebitatus aſſumpſit* (in ſome caſes) will lie, to recover the money ſo raiſed, &c.

Thus, in the caſe of *Longchamp* v. *Kenny*, (*a*) which was an action of *indebitatus aſſumpſit* for money had and received, money paid,

* *The following caſe.* (*a*) *Doug.* 137.

and money lent. The facts were as follow: The plaintiff was a waiter at one of the great ſubſcription houſes, or clubs, in *St. James's Street*, of which the defendant was maſter. Each of them had received, from Mrs. *Cornely's*, a number of maſquerade tickets to diſpoſe of, for which they were to account after the maſquerade, by paying the value, or returning the tickets. *Kenny* had got poſſeſſion of one of the tickets which had been delivered to *Longchamp*, and when Mrs. *Cornely's* agent came to demand an account of *Longchamp's* tickets, he was told by *Longchamp*, that *Kenny* had had one of them, and he muſt pay for it. Upon this the agent went and made a demand on *Kenny*, who ſaid, "well, if I had it, what then? Go to the perſon who received it of you, and let him pay you". *Longchamp* was then threatened with an arreſt, on which he paid five guineas, (the value of the ticket) to Mrs. *Cornely's* agent, and then brought this action againſt *Kenny*.

At the trial, the plaintiff obtained a verdict of five guineas; but a queſtion was reſerved for the opinion of the court of *King's Bench*, whether the action ſhould have been *trover*, or *aſſumpſit*?

For the defendant it was contended that *trover* was the proper form of action. In a count for *money paid*, the words, "at the defendant's ſpecial inſtance and requeſt", are not mere words of courſe. There muſt be a privity in the tranſaction between the parties, in order to ſupport ſuch a count; and as to the count for *money had and received*, though ſuch privity is not neceſſary to ſupport that, yet it muſt appear that money, which ought to have been paid to the plaintiff, had in fact been received by the defendant. In this caſe there was no proof that the ticket had been ſold, or any money received for it by *Kenny*.

Lord *Mansfield*, Ch. J. ſaid: "It is certain that where the demand is for a ſpecific thing, an action cannot be maintained in this form. Great benefit ariſes from a liberal extenſion of the action for *money had and received*; becauſe the charge and defence in this kind of action, are both governed by the true equity and conſcience of the caſe. But it muſt not be carried beyond its proper limits. The plaintiff muſt never be permitted to turn the generality of the count into a ſurprize upon the defendant, by deſerting the ground which the defendant was led to judge the only matter to be tried, and reſorting to another of which he could not have the leaſt ſuſpicion. If the preſent action had been brought without notice of the nature of the demand, I ſhould

have thought it could not have been ſupported. But, here, the defendant came prepared. If he ſold the ticket, and received the value of it, it was for the plaintiff's uſe, becauſe the ticket was his. Now, as the defendant has not produced the ticket, it is a fair preſumption that he has ſold it."

Aſhhurſt and *Buller*, Juſtices, were inclined to think, that the evidence would have ſupported the count for money *paid*. But they gave no deciſive opinion on that point; being clear that the count for money *had and received* was maintainable.

So, in the caſe of *Norris* v. *Napper*, (*b*) which was alſo an action of *indebitatus aſſumpſit*, for money had and received. The facts proved at the trial were, that the plaintiff was a ſoldier in Lord *Arran*'s regiment of horſe, in the defendant's troop; the regiment being commanded for *Holland*, the plaintiff and his horſe were ſhipped on board a tranſport, and in their paſſage met with ſuch a ſtorm, that by the working of the ſhip the plaintiff's horſe was killed; that ſeveral other horſes were loſt in the ſame ſtorm; and the *queen* made an allowance of 15*l*. per horſe, for every horſe that was loſt, to remount the troopers, which was paid by the *queen* to Lord *Arran*, for all the horſes that were loſt, and by him laid out in buying horſes; fifteen of which horſes were ſent to the defendant to ſupply the loſs in his troop, but before theſe horſes came over the plaintiff was broke, and ſo was never remounted; that when the plaintiff came into the troop he brought in his own horſe. *Holt*, Ch. J. held, that this evidence maintained the action; for though the captain, the defendant, did not actually receive the 15*l*. in money, yet he received a ſatisfaction which was money's worth, and the plaintiff cannot bring trover for the horſe becauſe he cannot claim any one of the fifteen horſes in particular, none having been ever delivered to him. But the reporter adds, that at the counſel's requeſt it was made a caſe for his further conſideration; and it does not appear whether it was ever finally determined.

But, in the caſe of *Nightingal and others, aſſignees of Mettivier, a Bankrupt*, v. *Deviſme*, (*c*) it was determined, that an action of *indebitatus aſſumpſit* for money had and received, will not lie for the

(*b*) *Ld. Raym.* 1007. (*c*) 5 *Bur.* 2589. 2 *Bl. Rep.* 684. 1 *Eaſt Rep.* 1. *S. P. But ſee* Dutch v. Warren, *poſt*.

transfer

transfer and receipt of ſtock in the public funds, unleſs it be actually converted into money.

Lord *Mansfield* ſaid: "This is a new ſpecies of property which has ariſen within the compaſs of a few years. It is not money. We are all of opinion that this action for money had and received will not lie in the preſent caſe, where no money was received."

So, where goods are diſtrained for rent in arrear, but the landlord delivers them back to the tenant on his promiſing to pay the rent; an action for money had and received will not lie for the value of the goods, though the tenant do not pay the arrears of rent.

Thus, in the caſe of *Leery* v. *Goodſon*, (*d*) which was an action of *aſſumpſit*. The declaration ſtated that, the plaintiff having diſtrained ſome pictures on *Poole*, his tenant, and being about to ſell them, the defendant, in conſideration that the plaintiff would return the goods to *Poole*, undertook to pay the plaintiff a certain part of the rent in a week, and the reſt in a month; yet that he did not pay, &c. There was alſo another count for *money had and received*. On the trial it appeared that the agreement was, that the plaintiff ſhould deliver the pictures to the defendant, and not to *Poole*; upon which it was objected that the evidence did not ſupport the contract declared upon. Lord *Kenyon*, Ch. J. before whom the cauſe was tried, thought it was a fatal variance, but permitted a verdict to be taken for the plaintiff, with liberty to the defendant to move to enter a nonſuit, if the court of *King's Bench* ſhould be of opinion that the plaintiff was not entitled to recover. A rule, for that purpoſe, was accordingly obtained; but the counſel for the plaintiff ſhowed cauſe againſt it. He abandoned the ſpecial count, but ſaid, that the plaintiff might reſort to the general count for money had and received; for, as the defendant could not but know on the face of the record that the cauſe of action was the value of the pictures, he could not be ſurpriſed by the plaintiff's inſiſting to recover that value on either of the counts. And he cited the caſe of *Longchamp* v. *Kenny*,* as being in point.

(*d*) 4 *Term Rep.* 687. * *Ante*, 18.

Sed per curiam. "In the caſe cited the ticket was delivered for the purpoſe of being carried to market; and the preſumption was that it was ſold, as the defendant would give no account of it. But here a contrary preſumption ariſes, for the pictures were delivered to the defendant in order to avoid their being ſold." The rule was therefore made abſolute, and a nonſuit ordered.

4. *Of Money Had and Received by and from Agents; and of Money depoſited with Stake-holders, &c.*

If money be received by an agent for the uſe of his principal, and he refuſes to pay it over, an action of *indebitatus aſſumpſit* for money had and received lies againſt him at the ſuit of his principal. (*e*)

So, a book-keeper in *Smithfield* market, receiving money for beaſts ſold there, is liable to pay ſuch money to the owner of the beaſts, and cannot apply it in payment of a debt due to him from the ſaleſman.

Thus, in the caſe of *Goode* v. *Jones*, (*f*) which was an action of *aſſumpſit* for money had and received. The plaintiff, a grazier in the country, had ſent three oxen by *Cooke*, his drover, to *Smithfield* market to be ſold by a ſaleſman there. *Holbeach*, the ſaleſman, employed the defendant as his book-keeper, and he was alſo employed by ſeveral other ſaleſmen. On the evidence it appeared, that it was the buſineſs of the book-keeper to receive the money from the purchaſer, and keep an account of the beaſts ſold, diſtinguiſhing what each beaſt was ſold for, and to whom it belonged. When that is done, the ſaleſman ſends an order to the book-keeper, deſiring him to pay the money to the drover.

In the preſent caſe, *Holbeach*, the ſaleſman, being indebted to the defendant, he refuſed to pay the money received for the plaintiff's cattle to him, inſiſting that he had a right to retain the money received by him on that account, to ſatisfy the debt due to him from *Holbeach*. *Holbeach* became inſolvent, and the plaintiff brought the preſent action.

(*e*) *Vide ante tit. Principal, Factor, and Agent*, 1 *Vol.* 261.
(*f*) *Peake's Cas. N. P.* 177.

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The counſel for the defendant, it was contended, that there was no privity between the plaintiff and the defendant, the defendant kept his account with *Holbeach* only, and the plaintiff could only call on him for the money. This is much like the caſe of a banker. If a ſum of money is paid into his hands for the uſe of a factor, it will never be contended that the principal may maintain an action againſt him. He alſo offered to call witneſſes to prove that by the univerſal cuſtom of the market, the book-keeper was conſidered as the debtor of the ſaleſman, and not of the grazier, with whom he had no connexion.

Lord *Kenyon*, Ch. J. ſaid, he never was clearer in any caſe than the preſent. "By the common law of the land the plaintiff is entitled to receive this money from the defendant, and no cuſtom whatever can deprive him of it. There is not the leaſt ſimilitude between the caſe of a banker and the preſent defendant. No privity whatever exiſts between the banker of a factor and the principal, whom he never heard of, but this defendant knew that he was receiving this money for the uſe of the plaintiff; he entered his name in his book, and diſtinguiſhed how much was due to him."

An action of *indebitatus aſſumpſit* lies upon the ſtat. 43 Geo. III. c. 55. by a leſſee of certain land againſt the receiver-general of the land-tax for a county, to recover a ſum of money duly aſſeſſed by a jury as a compenſation to the plaintiff for his damages by reaſon of giving the poſſeſſion and uſe of that land "*during the time for which the ſame ſhould be required for the public ſervice.*" (g)

If money be paid by miſtake to an agent, expreſsly for the uſe of his principal, and the agent has paid it over, he is not liable in an action, by the perſon who miſpaid it: becauſe it is juſt that one man ſhould not be a looſer by the miſtake of another; and the perſon who made the miſtake is not without redreſs, but has his remedy over againſt the principal. On the other hand it is juſt, that as the agent ought not looſe, he ſhould not be a gainer by the miſtake. And, therefore, if after the payment ſo

(g) Bingham v. Serle, 5 *Eaſt Rep.* 534.

made to him, and before he has paid the money over to his principal, the perſon corrects the miſtake; the agent cannot afterwards pay it over to his principal, without making himſelf liable to the real owner for the amount. (*i*)

But in the caſe of *Burrough* v. *Skinner*, (*k*) it was held, that an action for money had and received would lie againſt an *auctioneer* to recover back a depoſit paid to him on account of lands purchaſed by the plaintiff, but to which no title could be made; it not appearing that the money had been paid over to the principal. And it was ſaid, that the auctioneer was as a ſtake-holder, and ought not to have parted with the money till ſuch time as it ſhould appear in the event to whom it properly belonged.

If an agent pays money of his principal which ought not to be paid, it may be recovered back by an action of *indebitatus aſſumpſit*, either at the ſuit of the agent or his principal. (*l*)

So, where a broker having a lien on certain policies of inſurance effected for his principal, for whom he had given his acceptances, the defendant promiſed that he would provide for the payment of thoſe acceptances as they became due upon the plaintiff's giving up to him ſuch policies, in order that he might collect for the principal the money due thereon from the underwriters; which was accordingly done, and the money was afterwards received by the defendant it was determined, (*m*) that this was not a promiſe for the debt or default of another within the ſtatute of frauds; and that the plaintiff might recover againſt the defendant, as well for the breach of agreement in not providing for the payment of the acceptances, as alſo upon a count for money had and received.

Of Money depoſited with a Stake-holder, &c.] If money be depoſited in the hands of a ſtake-holder for the purpoſe of being paid over to the winner on the event of a legal wager, an action of *indebitatus aſſumpſit* will lie by the winner againſt the ſtake-holder.

(*i*) Per *Lord* Mansfield, *Cowp.* 566. 806. *See alſo* Sadler v. Evans, 4 *Bur.* 1984. *and ſee Stra.* 480. *and* 3 *Eſp. Rep.* 233.
(*k*) 5 *Bur.* 2639. et vide *ante*, 1 *Vol.* 255, *&c.*
(*l*) *Cowp.* 806. *Doug.* 637. *Bul. N. P.* 35.
(*m*) Caſtling v. Aubert, 2 *Eaſt Rep.* 325.

Thus,

Thus, in the caſe of *Temple* v *Welds*, (*n*) which was an action of *indebitatus aſſumpſit* for money had and received. Upon evidence the caſe came out thus: the plaintiff and another laid a wager; the defendant held the ſtakes; the plaintiff brought evidence that he had won the wager. The plaintiff, however, was nonſuited; the judge who tried the cauſe being of opinion that the plaintiff had miſtaken his action; becauſe this money could not, at the time of the action brought, be ſaid to be money received to the plaintiff's uſe, ſince the defendant was not to pay the money until the wager was proved to be won.

But, on motion being made to ſet aſide this nonſuit, it is reported that the court ſaid the action was well brought; for upon the wager being won, the money was actually the plaintiff's, though he could not receive it before the fact was made appear.

5. *Of Money Had and Received by Revenue Officers, either by* Miſtake *or* malâ fide.

If duties be paid to a revenue officer by miſtake, and he pays them over to his ſuperior officer before he has notice of the miſtake, an action of *indebitatus aſſumpſit* does not lie againſt him.

Thus, in the caſe of *Greenway* v. *Hurd*, (*o*) which was an action of *indebitatus aſſumpſit* for money had and received. At the trial it appeared that the action was brought to recover back 529*l.*, which the plaintiff had paid in *July*, 1785, to the defendant, who was a collector of exciſe, for certain duties on the cotton manufacture impoſed by the 24 Geo. III. c. 40.; which act, it was admitted, had been repealed, as far as related to theſe duties by the 25 Geo. III. c. 24. before the duties were incurred; the latter ſtatute repealing the duties "from and after the paſſing of that act," and, conſequently, relating to the firſt day of the ſeſſions, the 25th of *January*, 1785. In *June*, 1785,

(*n*) 10 *Mod.* 315. Vide *Holt's Rep.* 37. Dawſon v. Scriven, 1 *H. Bl.* 218. *which was an action againſt the clerk of a courſe, for a ſubſcription purſe, at the ſuit of the winner*, poſt.

(*o*) 4 *Term Rep.* 553. *Cowp.* 69. *Loft.* 530. *S. P.*

the

the plaintiff poſitively refuſed to pay theſe duties, which, however, he afterwards paid on the 22d of *July* following.

It was objected by the defendant's counſel, that as the defendant had paid the money over to his ſuperior officer before the action was brought, the plaintiff could not recover back the money from the defendant who was a public officer, and who had been obliged under the terrors of a penalty, to pay over this money; and that if he could, the defendant was entitled to a month's notice before the action was brought, under the 23 Geo. III. c. 70. ſ. 30. which had not been given; and the judge being of this opinion nonſuited the plaintiff.

A motion, however, was afterwards made to ſet aſide that nonſuit: but the court were of opinion, that the action would not lie, becauſe the money had been paid over before the action was brought, and a month's notice had not been given to the defendant.

Lord *Kenyon*, Ch. J. ſaid: "The queſtion here is not whether the plaintiff has not ſome remedy, but whether he can recover againſt this defendant. This in principle is like the caſe of *Sadler* v. *Evans*, (*p*) where it was held that an action for money had and received againſt a known agent would not lie, but that the party muſt reſort to the ſuperior. Here the plaintiff has led the defendant into this error. If the defendant had not paid the money over, he would have ſubjected himſelf to puniſhment; and it would be hard that he ſhould alſo be puniſhed by an action if he did pay it over; at all events the defendant was entitled to notice. It has been frequently obſerved by the courts that the notice, which is directed to be given to juſtices, and other officers, before actions are brought againſt them, is of no uſe to them when they have acted within the ſtrict line of their duty, and was only required for the purpoſe of protecting them in thoſe caſes where they intended to act within it, but by miſtake exceeded it. Here the defendant acted as an officer of the exciſe when he received this money, and the plaintiff paid it to him in that character."

But this form of action lies to recover back money paid to a cuſtom-houſe officer, which has not been paid over by him, where

(*p*) 4 *Bur.* 1984.

the

the duty, in reſpect of which he received the money, was not impoſed by lawful or ſufficient authority to warrant it. (*q*)

So, *indebitatus aſſumpſit* for money had and received, will lie to recover back *exhorbitant fees* taken by a cuſtom-houſe officer.

Thus, in the caſe of *Stevenſon* and others v. *Mortimer*, (*r*) which was an action for money had and received, brought by the plaintiffs, as owners of a boat employed in carrying chalk and lime, from one part of the coaſt of *Suſſex* to another, *viz.* from *Eaſt Bourne* to *Haſtings*: and the action was brought to recover the whole or part of certain ſums of money paid by the maſter of the boat, who was the plaintiffs' ſervant, to the defendant, a cuſtom-houſe officer, as his fees due upon the maſter's taking out a coquet and bond under an idea that this boat came within the ſtat. 13 and 14 Car. II. c. 11. ſ. 7., by which it is enacted, "That no goods ſhall be ſhipped, or put on board, to be carried forth to the open ſea from any port or place, &c. to any other port or place of the realm, without a ſufferance or warrant firſt had and obtained; and that the maſter of every ſhip and veſſel, who ſhall lade or take in any goods, &c. in any port, member, or creek, within the kingdom, to be landed or diſcharged in ſome other port, member, or creek, ſhall, before the ſhip or veſſel be removed or carried out of the port, where he ſhall take in ſuch lading, take out a coquet, and become bound, in a certificate with good ſecurity, in the value of the goods, for delivery thereof, in the port or place for which the ſame ſhall be entered; and to return a certificate of their being ſo landed, upon pain of forfeiting the penalty of the bond." The queſtion intended to have been tried was, whether a coquet was neceſſary to be taken out under the ſtat. 13 and 14 Car. 2. for goods carried coaſtwiſe. But before the trial the plaintiffs gave notice, that they alſo meant to go upon the ground of the defendant having taken exorbitant fees: he had demanded and received 14*s.* and 6*d.*

Mr. Serjeant *Sayer*, before whom the cauſe was tried, was of opinion, that this duty being impoſed by the ſtatute upon the maſter, the action was wrong brought in the name of the owners, and accordingly nonſuited the plaintiff.

(*q*) Campbell v. Hall, *Cowp.* 204. *Loft.* 655. *S. C.* (*r*) *Cowp.* 805.

But,

But, upon a motion being made for a rule to ſet aſide the nonſuit, and for a new trial, the Court of *King's Bench* determined that the action was properly brought againſt the defendant, and therefore made the rule abſolute.

Lord *Mansfield*, Ch. J. ſaid: "The ground of the nonſuit at the trial was, that this action could not be well maintained by the plaintiffs, who are the owners of the veſſel in queſtion; but it ought to have been brought by the maſter, who actually paid the money. That ground, therefore, makes now the only queſtion before us: as to which there is not a particle of doubt. *Qui facit per alium, facit per ſe.* Where a man pays money by his agent, which ought not to have been paid, either the agent or principal may bring an action to recover it back. The agent may, from the authority of the principal, and the principal may, as proving it to have been paid by his agent. If mony is paid to a known agent, and an action brought againſt him for it, it is an anſwer to ſuch action, that he has paid it over to his principal, *Sadler* v. *Evans*, 4 *Burr.* 1984. Here the ſtatute lays the burthen on the maſter from neceſſity; and makes him perſonally liable to penalties if he neglects to perform the requiſitions of it. But ſtill he is entitled to charge the neceſſary fees, &c. upon his doing ſo, to the account of his owners. And in this caſe, there can be no doubt of the relation in which the maſter ſtood to the plaintiffs; for he is the witneſs, and he ſwears, that the money was paid by the order of the plaintiffs. Therefore they are very well warranted to maintain the action. If the parties had gone to trial upon an apprehenſion that the only queſtion to be tried was, whether this was a caſe within the act of parliament, conſequently, whether any fee was due, the plaintiff could not have been permitted to ſurpriſe the defendant at the trial, by ſtarting another ground, upon which to recover a *Norfolk* groat. An action for money had and received is governed by the moſt liberal equity. Neither party is allowed to entrap the other in form. But here the plaintiff gave notice, that he meant to inſiſt that too much was taken; and therefore both came to the trial with equal knowledge of the matter in diſpute. Therefore the rule for a new trial muſt be abſolute."

So, if a revenue officer ſeize goods as forfeited, which are not liable to ſeizure, and take money of the owner to releaſe them, the

the latter may recover back the money in an action for money had and received; and in such an action a month's notice need not be given under the 23 Geo. III. c. 70. s. 30.

Thus, in the case of *Irving* v. *Wilson* and another, (*s*) which was an action of *indebitatus assumpsit* for money had and received, to recover the sum of 2*l.* 11*s.* under the following circumstances: The defendants, who were custom-house officers, had seized some hams near *Carlisle*, which the plaintiff was sending in three several carts from *Scotland* to *Carlisle*. The plaintiff obtained one permit for the whole; but owing to some accident two of the carts were at the distance of two miles behind the other; when the defendants met the first cart and demanded the permit, the driver informed them that the permit was with the other carts which came up in an hour and a half afterwards, before the first reached *Carlisle*, but not till the officer, after waiting some time without seeing the other carts, had made the seizure. They were all three driven to the custom-house at *Carlisle*, the defendants saying they could not release them unless the collector were applied to. When the whole was explained to the collector, he said he would have no concern in the taking. And the defendants then refused to give up the carts with the cargoes, unless the plaintiff would give them 2*l.* 11*s.*; which he accordingly did.

It was objected on the part of the defendants, that the plaintiff, by this transaction with the revenue officers, had incurred a penalty of 50*l.*, and that he could not recover back the money which he had paid to have the goods, which had been seized, returned to him; and the plaintiff was nonsuited, with leave to move to set that nonsuit aside, and to enter up a verdict for him, if the Court of *King's Bench* should be of opinion that the plaintiff could maintain this action. It was also contended, that the defendants were entitled to a month's notice under the 23 Geo. III. c. 70. s. 30. and 24 Geo. III. c. 46. s. 39.

But, the court determined, that the plaintiff was entitled to recover the money in question in this form of action, and without any previous notice.

Lord *Kenyon*, Ch. J. said: "The revenue laws ought not to be made the means of oppressing the subject. Here, a permit

(*s*) 4 *Term Rep.* 485.

having

having been granted for the whole quantity of goods, and which was with the other carts behind at the time of the ſeizure, the ſeizure was clearly illegal. The permit for the entire quantity could not be ſeparated and diſtributed to each of the carts. And therefore whatever ground of probability there was for ſtopping the firſt cart, yet after the matter was cleared up, there was no pretence for making a ſeizure; and it was highly improper in the officers to take the money. If goods liable to a forfeiture be forfeited, the officer is to ſeize them for the king; but he is not to be permitted to abuſe the duties of his ſtation, and to make it a mode of extoriton. Here the defendants took the money under circumſtances which could by no poſſibility juſtify them, and therefore this could not be called a voluntary payment; but it was extorted from the plaintiff, and in that caſe no notice to the defendants was neceſſary."

6. *Of Money Had and Received by Sheriffs, Gaolers, and their reſpective Officers.*

If a ſheriff levies money upon a *fieri facias*, the plaintiff may have an *indebitatus aſſumpſit* againſt him for ſo much money received to his uſe; (*t*) it alſo lies againſt his executors, if he die, for this is not like an eſcape, which is a wrong done by the ſheriff himſelf, but it is founded on a duty due by the ſheriff, which ſhall ſurvive and charge his executors. (*u*)

So, in the caſe of *Mc. Neil* v. *Perchard* and another, (*v*) which was an action of *indebitatus aſſumpſit* for money had and received, brought to recover the ſum of 106*l.* under the following circumſtances: The plaintiff being indebted to one *Parks*, a writ iſſued, directed to the defendants, ſheriffs of *London*, to hold him to bail for that ſum at the ſuit of *Parks*. The ſheriffs directed their warrant to one of their officers of the name of *Kellett*, who arreſted the plaintiff, and upon the arreſt being made, the plaintiff paid into *Kellett*'s hands the above-mentioned ſum of 106*l.* which *Kellett* undertook to return on the plaintiff's putting in, and juſtifying bail to the action. The plaintiff did put in and juſtify bail; and the preſent action was brought to recover the money ſo paid into

(*t*) *Comb.* 430. (*u*) 3 *Salk.* 323. (*v*) 1 *Eſp. Rep.* 263.

Kellett's

Kellett's hands, which he had not returned to the plaintiff pursuant to his undertaking.

Upon the trial before Lord *Kenyon*, Ch. J., the plaintiff obtained a verdict.

So, where a ſheriff's officer, being in poſſeſſion of the tenant's effects under an outlawry, made a diſtreſs for the rent, ſold the goods ſo diſtrained, and afterwards the outlawry was reverſed: it was ruled that the officer was liable to pay the produce of the goods to the landlord, in an action for money had and received.

Thus, in the caſe of *The Preſident and Scholars of St. John's College, Oxford* v. *Murcott*, (*w*) which was alſo an action of *indebitatus aſſumpſit* for money had and received. On the trial, a verdict was taken for the plaintiff, with damages 166*l.* ſubject to the opinion of the Court of *King's Bench* on the following caſe:

On the 21ſt *November*, 1791, *William Grant*, the tenant of a farm at *Waſperton*, in the county of *Warwick*, under the plaintiffs, at the yearly rent of 166*l.* was outlawed in an action of treſpaſs on the caſe, upon promiſes, at the ſuit of *W. Priddle*. On the 25th of *April*, 1792, a writ of *capias utlagatam*, directed to the ſheriff of the county of *Warwick*, was iſſued againſt *Grant*; on which the ſheriff, on the 7th of *May* 1792, iſſued his warrant, directed to the defendant and other perſons, commanding them to ſeize the goods and chattels, lands and tenements of *Grant*; ſo that the ſheriff might cauſe the ſame to be appraiſed and ſeiſed into his Majeſty's hands. Under that warrant the defendant entered upon the farm in the occupation of *Grant*, and took poſſeſſion of all the goods and chattels that *Grant* then had upon the premiſes. The ſheriff then ſummoned a jury to take an inquiſition by virtue of the writ on the 11th of *May*; but the inquiſition was then adjourned to the next day, when it was taken. On the 11th of *May*, (the defendant being then in poſſeſſion of the farm, and of the goods and chattels of *Grant*, under the ſaid writ) the Reverend *T. Welſh*, on behalf of the plaintiffs, applied to the defendant, and informed him that a year's rent of the farm was due to the plaintiffs from *Grant*, and that he intended to diſtrain for it. The defendant then offered to make the diſtreſs for the plaintiffs, and ſaid he could do it as well as another. Mr. *Welſh* then gave the defendant directions to make the diſtreſs, and accordingly, on the

(*w*) 7 *Term Rep.* 259.

12th

12th of *May*, he diſtrained part of the effects already in his poſſeſſion under the writ, but not any of the crops then growing on the premiſes. Being himſelf an auctioneer, he, on the 18th of *May*, ſold by auction ſufficient to produce the 166*l.* due for rent, and the expences of making the diſtreſs; and about a week after the ſale the defendant told Mr. *Welch* that the buſineſs was all finiſhed; that he had lodged the money in the hands of his bankers, and it was ready whenever the *College* choſe to demand it. About a fortnight afterwards, Mr. *Welſh* applied to the defendant for the money, but the defendant then told him that he had had advice upon the buſineſs; that he apprehended the diſtreſs was not legal, and he would not pay the money. The defendant continued in the occupation of the farm under the writ; and when the crops growing on the farm became ripe, reaped them, and got in the harveſt. On the 4th *October*, 1792, the outlawry againſt *Grant* was reverſed. On the 24th *October*, a writ of *amoveas manus*, on the reverſal of the outlawry, was iſſued; and on the 7th of *November* a warrant, iſſued by the ſheriff on the ſaid writ, was delivered to the defendant; and the defendant, on the ſame day, quitted the poſſeſſion of the ſaid farm, and the tenant re-entered. In *July*, 1793, after the defendant had quitted the poſſeſſion of the farm, Mr. *Welſh* again applied to him for the 166*l.* but the defendant refuſed to pay it, ſaying, that he had expended money in getting in the crops upon the farm, and if *Grant* would pay him for that expence, he would pay the 166*l.* to the plaintiffs.

The Court were of opinion that the plaintiffs were entitled to recover the 166*l.* as ſo much money received by the defendant for their uſe.

Aſhhurſt, J. ſaid, "The inſtant this outlawry was reverſed, the judgment of outlawry became mere waſte paper, and the rights of all the parties were reſtored to the ſame ſituation as if no outlawry had taken place. In this caſe the defendant made this diſtreſs for the plaintiffs at his own requeſt; and having received the money, he objects to pay it over to his employers on another account, with which they have no concern: but having taken upon himſelf to act as their bailiff, and the bar which before exiſted being now removed by the reverſal of the outlawry, it appears that he has received money for the uſe of the plaintiffs, which in conſcience he is not entitled to retain merely on account of his having ſome

ſome demand on the tenant. And with regard to that demand, the defendant is not without a remedy; for if, during the time he was in poſſeſſion under the outlawry, he was put to any expence in reaping and getting in the crops, he may maintain an action againſt the tenant to recover thoſe expences.

Where, by the regulations of a priſon, made by the magiſtrates, certain rates are ſettled for lodging, &c. within the priſon, the goaler cannot take more than that ſum; and if he does, he ſhall be liable to refund it, though he has paid it over to the magiſtrates, to whom he accounts.

Thus, in the caſe of *Miller* v. *Aris*, (*x*) which was an action of *indebitatus aſſumpſit* for money had and received; and brought againſt the defendant, who was governor of the priſon in *Cold-Bath Fields*, to recover a ſum of money paid by the plaintiff, for lodging and victuals, while he was confined as a priſoner in that place of confinement.

This priſon is under the regulation of the magiſtrates of the county of *Middleſex*, by whom a particular code of printed regulations is framed for its government.

By the 25th rule of thoſe printed regulations, "The governor "is allowed to demand of every perſon committed for ſafe cuſ"tody only, and not in execution and requiring to be lodged in "a better manner than the reſt of the priſoners, and able to pay "for a bed, the ſum of 1*s*. for a night; and to keep one or more "beds, always fit for uſe, in caſe ſuch beds ſhould be wanting." It was proved that the plaintiff, having had one of thoſe beds while he was in cuſtody, had been charged and paid for it one guinea per week: to recover the overplus of which ſum, above that ſettled by the rule, was one of the articles of the plaintiff's demand.

By another of thoſe printed regulations, the governor is prohibited from furniſhing the priſoners with victuals, or contracting for the ſame. The plaintiff, during the period of his confinement, had been charged and paid for victuals: to recover the money ſo paid, conſtituted the ſecond article of his demand.

In anſwer to the demand for lodging, the defendant relied that he accounted at the ſeſſions to the county for the ſums received on account of the goal; that the charge of one guinea

(*x*) 3 *Eſp. Rep* 231.

per week was ſanctioned by uſage, and authorized by the juſtices, who paſſed the accounts, and he gave in evidence the book kept for that purpoſe, containing the account of the lodging of the ſeveral priſoners; and which book was furniſhed to the magiſtrates, and contained the charge in queſtion.

The ſecond demand for victuals was completely diſproved; it appearing that the cook of the priſon was the perſon ſolely intereſted in providing the victuals.

Lord *Kenyon*, Ch. J. before whom the cauſe was tried, ſaid, "For the demand of victuals, the plaintiff cannot recover: but I am of opinion that the action is maintainable for the overplus money paid on account of the lodging. It is relied on for the defendant, that he is merely an agent, receiving the money from the priſoners, and paying the produce to the county. The caſe of *Sadler* v. *Evans*, 4 Burr. 1985, is relied on; it has been ſo laid down by very high authority in that caſe, that where money has been received by an agent, you cannot ſue him, but muſt have recourſe to the principal; but that is where there is no corruption in the foundation of the contract, nor is bottomed in oppreſſion or immorality.

The rules for the regulations of this priſon are properly made; but priſons are not places where priſoners are to have all the conveniences and comforts of life. Gaolers are bound to treat their priſoners with humanity; but the regulations framed for the priſon ought to be conformed to. Theſe regulations have pointed out what ſums ought to be taken: it ſhould not be in the power of the gaoler to diſpenſe with thoſe regulations, and to enter into contracts with thoſe in their cuſtody, and under their controul: to allow that, might be to ſanction oppreſſion. In caſes of uſury, the perſon whoſe neceſſities prompt him to borrow, will enter into any improvident contract whatever, and ſubmit to any terms, however exceſſive, to procure money: but the law will protect him, and not ſuffer it. In this caſe I think the law will interpoſe in the ſame way, and not permit ſuch an agreement to be entered into. I am therefore of opinion, that the plaintiff is entitled to recover the money paid for the lodging, above the ſum allowed by the regulations."

7. *Of Money Paid or Received by Miſtake or Deceit, Between Private Individuals; and of Voluntary Payments, &c.*

1. *Of Money paid by Miſtake.*] If one perſon pays money to another, on a miſtake either of fact or of law, and without full knowledge of the circumſtances under which it is paid, an action of *indebitatus aſſumpſit* lies to recover it back. (y)

So, if two men reckon together, and one overpays the other, an *indebitatus aſſumpſit* lies for the money ſo overpaid. (z)

But where money has been paid upon a *forged* bill of exchange to a *bonâ fide* holder, who had given value for it, the money cannot be recovered back from him.

Thus, in the caſe of *Price* v. *Neale*, (a) which was an action of *indebitatus aſſumpſit* for money had and received; and it was proved at the trial that a bill was drawn as follows:—"*Leiceſter*, "22d *November*, 1760. Sir, Six weeks after date pay *Mr. Ro-* "*gers Ruding*, or order, forty pounds, value received for *Mr.* "*Thomas Poughſor*, as adviſed. Signed *Benjamin Sutton.* Direct- "ed to Mr. *John Price*, in *Buſh Lane, Cannon-ſtreet, London:*" indorſed, "*R. Ruding, Antony Topham, Hammond and La Roche.* "Received the contents, *James Watſon and Son.* Witneſs, *Ed-* "*ward Neale.*" This bill was indorſed to the defendant for a valuable conſideration; and notice of the bill left at the plaintiff's houſe, on the day it became due. Whereupon the plaintiff ſent his ſervant to call on the defendant, to pay him the ſaid ſum of 40*l.* and take up the ſaid bill, which was done accordingly: that another bill was drawn as follows:—"*Leiceſter*, 1ſt *February*, 1761. "Sir, Six weeks after date pay Mr. *Rogers Ruding*, or order, "forty pounds, value received for Mr. *Thomas Ploughſor*, as ad- "viſed by, Sir, your humble ſervant, *Benjamin Sutton.* To Mr. "*John Price*, in *Buſh Lane, Cannon-ſtreet, London.*" That this bill was indorſed, "*R. Ruding, Thomas Watſon and Son*; witneſs "for *Smith, Wright and Co.*:" that the plaintiff accepted this bill, by writing on it, "Accepted, *John Price*;" and that the plaintiff wrote on the back of it, "Meſſieurs *Freame and Barclay*, pray pay

(y) Per Treby, *Ch. J.* 1 *Salk.* 22. *See alſo* 2 *Bl. Rep.* 825.
(z) Per Holt, 2 *Lord Raym* 1217. (a) 3 *Bur.* 1354.

" 40*l.* for *John Price*:" that this bill, being ſo accepted, was indorſed to the defendant for a valuable conſideration, and left at his bankers for payment, and was paid by order of the plaintiff, and taken up. Both theſe bills were forged by one *Lee*, who had been hanged for forgery. But that the defendant *Neale* acted innocently and *bonâ fide*, without the leaſt privity or ſuſpicion of the ſaid forgeries, or of either of them; and paid the whole value of thoſe bills.

The jury found a verdict for the plaintiff, damages 80*l.*, ſubject to the opinion of the Court of *King's Bench* upon this queſtion:—" Whether the plaintiff, under the circumſtances of " this caſe, could recover back, from the defendant, the money " he paid on the ſaid bills, or either of them?"

The Court were of opinion that the plaintiff was not entitled to recover back any part of the money he had ſo paid.

Lord *Manſfield* delivered his opinion as follows: " This is an action for money had and received to the plaintiff's uſe: in which action, the plaintiff cannot recover the money, unleſs it be againſt conſcience in the defendant to retain it: and great liberality is always allowed in this ſort of action. But it can never be thought unconſcientious in the defendant to retain this money, when he has once received it upon a bill of exchange, indorſed to him for a fair and valuable conſideration, which he had *bonâ fide* paid, without the leaſt privity or ſuſpicion of any forgery. Here was no fraud, no wrong. It was incumbent upon the plaintiff to be ſatisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it: but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him; and he ſends his ſervant to pay it and take it up. The other bill he actually accepts; after which acceptance the defendant innocently and *bonâ fide* diſcounts it. The plaintiff lies by for a conſiderable time after he has paid theſe bills; and then found out that they were forged; and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his own ſide. The defendant had actual encouragement from the plaintiff himſelf for negotiating the ſecond bill, from the plaintiff's having, without any ſcruple or heſitation, paid the firſt; and he paid the whole value, *bonâ fide*: it is a misfortune which has happened without the defendant's fault

fault or neglect. If there was no neglect in the plaintiff, yet there is no reaſon to throw off the loſs from one innocent man upon another innocent man: but, in this caſe, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant."

But in the caſe of *Ancher* and others *v. The Governor and Company of the Bank of England*, (*b*) where it appeared that one Captain *Dahl*, a *Dane*, and reſident in *Denmark*, being indebted to the houſe of *Claus Heide* and Co. in *London*, applied to one *Mæſtue*, to procure him a bill, in order to diſcharge the debt. *Mæſtue* accordingly obtained a bill from the plaintiffs at *Chriſtiana*, on *Claus Heide* and Co., with whom they had correſpondence; which bill was as follows:—"*Chriſtiana*, 17th *January*, 1778. Two "months after ſight, pleaſe to pay this, our ſole bill of exchange, "to Mr. *Jens Mæſtue*, or order, one hundred and twenty pounds "ſterling, value in account, and place it to account, as per advice, "from *Karen*, widow of *Chriſtian Ancher*, and ſons. To "Meſſieurs *Claus Heide* and Co. of *London*" On this bill was written, by *Mæſtue*, an indorſement, in the *Daniſh* language, of this import: "The within muſt be credited to Captain *Morten Larſen* "*Dahl*, value in account. *Chriſtiana*, 17th *January*, 1778. *Jens* "*Mæſtue*." And it was remitted to *Claus Heide* and Co. in the following letter:—"Agreeable to the deſire of Captain *Morten Larſen* "*Dahl*, of *Arendall*, I have incloſed, for his account, ſent you *Ka*"*ren Ancher* and ſon's bill on yourſelves, for 120*l.*, which you will, "on receipt, be pleaſed to credit his account with, and adviſe him "of the ſame."—The bill was received by *Claus Heide* and Co., and accepted, and they gave notice to the plaintiffs, and to *Dahl*, that they had received it, and placed it to his account. Afterwards a forged indorſement, in *Engliſh*, was written upon it, as follows:—"For me, to pay Mr. *Detleff D. Muller*, or order. "*Morten L. Dahl*." *Muller*, who was a clerk in the houſe of the acceptors, carried the bill, thus incloſed, but which never had been in the hands of *Dahl*, to the Bank, and indorſed it with his own name, upon which it was diſcounted in the ordinary courſe of buſineſs. When the day of payment came, the acceptors having became inſolvent, and *Muller* having abſconded, the bill was proteſted; and one *Fulgberg*, as a friend or agent for the plaintiffs, came to the Bank, and paid it for their honour as the

(*b*) *Doug.* 637.

drawers; but the forgery having been diſcovered, this action for money had and received was brought againſt the Bank, on the ground that the bill was not negotiable, on account of the ſpecial indorſement, and that it had, therefore, been diſcounted by the Bank in their own wrong, and the money paid by *Fulgberg*, to take it up, paid in miſtake.

The cauſe was tried at *Guildhall*, before Lord *Mansfield*; when his lordſhip directed a nonſuit; but it afterwards came before the Court of *King's Bench*, on a motion for a rule to ſet aſide the nonſuit, and for a new trial.

The Judges delivered their opinions, *ſeriatim*, as follow:

Lord *Mansfield*. "The ground of the nonſuit was, that the purpoſe for which the bill was drawn was anſwered, it having been applied to the credit of *Dahl*, and he having acquieſced. It therefore occurred to me, that the drawers had received no injury, and had no intereſt: but (which was not attended to at the trial,) there has been a ſecond payment for the honour of the plaintiffs; and it is contended that a conſideration has ariſen on that ſecond payment. Where there is equal equity, poſſeſſion muſt prevail; and the equity is equal between perſons who have been equally innocent, and equally diligent. The queſtion therefore is, whether the Bank has been equally diligent. A bill, though once negotiable, is certainly capable of being reſtrained. I remember this being determined upon argument. A blank indorſement makes the bill payable to bearer; but, by a ſpecial indorſement, the owner may ſtop the negotiability. *Mœſtue* did here. It does not ſeem to me that, after the ſpecial indorſement by *Mœſtue*, *Dahl* himſelf could have indorſed it over. *Mœſtue* did not mean to make himſelf anſwerable as an indorſer, or to enable *Dahl* to raiſe money on the bill. The Bank could not have maintained an action on the bill againſt the plaintiffs: it was their negligence not to read the ſpecial indorſement.

Willes, Juſt. I am of the ſame opinion. The queſtion is, whether the negotiability is not reſtrained by the indorſement? and I think it is. The Bank either did read, or ought to have read the indorſement. The only doubt is, what ſhould be the effect of the bill's having been taken up by a third perſon; but I think he muſt be taken to be the agent of the plaintiffs.

Aſhhurſt, Juſt. I am of the ſame opinion. The queſtion is, whether did the Bank uſe due diligence? If they had attended to the

the indorſement, they would not have diſcounted the bill. I think *Dahl* himſelf could not have indorſed it. It was never the intention that *Claus Heide* and Co. ſhould pay money to *Dahl*; but only that the amount ſhould be ſet-off in his account. If the bank have taken a bill not negotiable, it is their own fault, and they are not entitled to retain the money which has been paid them by miſtake."

Buller, J. ſaid: "I have the misfortune to differ from the reſt of the court. As to the forgery, it was decided in the caſe of *Price* v. *Neale*,* in this court, that if a forged bill has been taken up, the money ſhall not be recovered back from an innocent indorſee. Therefore, as againſt ſuch an indorſee, the forgery is not material. As to the indorſement by *Mœſtue*, it amounts to an indorſement to *Dahl*, and makes him the proprietor; and the bill being originally negotiable, it ſeems to me to have continued ſo. What is called a reſtrained indorſement, *viz.* that the bill was to be credited to *Dahl* appears to amount to the ſame thing as 'Pay to *Dahl*.' The words 'or order,' are omitted, but it has been determined, that ſuch omiſſion does not ſtop the negotiability of a bill. The circumſtances, that there was an account between *Dahl* and the drawers, cannot affect third perſons who knew nothing of that account. But if the bill was only meant to pay the drawers, why was it not cancelled by them when they received it? Why did they accept it? Did not that hold out negotiability to the reſt of the world? This is an anſwer to any ſuppoſed negligence in the defendants. Beſides, if the bill was not meant to be negotiable, why did the plaintiffs take it up? That was done by another perſon, as it is ſaid, for their honour, but they have by bringing the action adopted his act."

Lord *Mansfield* ſaid: "The whole turns on the queſtion, whether the bill continued negotiable. As the caſe ſtands at preſent, let the nonſuit be ſet aſide, but we will conſider of it further, and if we alter our opinions we will mention it."

The caſe was not mentioned any further by the court: the rule for a new trial was therefore made abſolute; and the cauſe was again tried before Lord *Mansfield*, when the jury, by his lordſhip's directions, found a verdict for the plaintiffs.

* *Ante*, 35.

If, however, money be paid by one with full knowledge, (or with full means of ſuch knowledge in his power) of all the circumſtances, it cannot be recovered back again on account of ſuch payment having been made under an ignorance of the law.

Thus, in the caſe of *Bilbie* v. *Lumley* and others, (*c*) which was an action of *aſſumpſit* for money had and received, brought by an underwriter upon a policy of inſurance, in order to recover back 100*l.* which he had paid upon the policy as for a loſs by capture to the defendants, the aſſured. The ground on which the action was endeavoured to be ſuſtained was, that the money was paid under a miſtake, the defendants not having, at the time of the inſurance effected, diſcloſed to the underwriter (the preſent plaintiff) a material letter which had before been received by them relating to the time of ſailing of the ſhip inſured. It was not denied that the letter was material to be diſcloſed; but the defence reſted on before the Court, and at the trial was, that before the loſs on the policy was adjuſted, and the money paid by the preſent plaintiff, all the papers had been laid before the underwriters, and amongſt others the letter in queſtion: and therefore it was contended at the trial, before *Rooke*, J. at *York*, that the money having been paid with full knowledge, or with full means of knowledge of all the circumſtances, could not now be recovered back again. On the other hand, it was inſiſted that it was ſufficient to ſuſtain the action, that the money had been paid under a miſtake of the law; the plaintiff not being apprized at the time of the payment that the concealment of the particular circumſtance diſcloſed in the letter kept back was a defence to any action which might have been brought on the policy: and the learned being of that opinion, the plaintiff obtained a verdict.

But, afterwards, upon a motion for a new trial, the Court of *King's Bench* determined that the plaintiff was not entitled to recover back the money; it having been paid *voluntarily* with a full knowledge of the facts of the caſe: therefore the verdict was ſet aſide.

Lord *Ellenborough*, Ch. J. aſked the plaintiff's counſel whether he could ſtate any caſe where if a party paid money to another *voluntarily*, with a full knowledge of all the facts of the caſe,

(*c*) 2 *Eaſt Rep.* 469.

he could recover it back again on account of his ignorance of the law? [No anſwer being given, his lordſhip continued,] "The caſe of *Chatfield* v. *Paxton*, (*d*) is the only one I ever heard of where Lord *Kenyon* at *Niſi Prius* intimated ſomething of that ſort. But when it was afterwards brought before this court, on a motion for a new trial, there were ſome other circumſtances of fact relied on; and it was ſo doubtful at laſt on what preciſe ground the caſe turned that it was not reported. Every man muſt be taken to be cognizant of the law; otherwiſe there is no ſaying to what extent the excuſe of ignorance might not be carried. It would be urged in almoſt every caſe."

So, where *A.* having obtained a patent for an invention of which he ſuppoſed himſelf the inventor, agreed to let *B.* uſe it upon payment of a certain annual ſum ſecured by bond: this ſum was paid for ſeveral years, when *B.* diſcovering that *A.* was not the inventor, but that it was in public uſe before *A.* obtained his patent, brought an action for money had and received to recover back the amount of the annuity paid. But it was determined, that *B.* could not recover back the amount of the annuity ſo paid; both parties having acted under a miſtake, and *B.* having had the uſe of the invention. (*e*)

2. *Of voluntary Payments.*] With reſpect to *voluntary payments*, the rule is, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conſcience he ought, he cannot recover it back again in an action for money had and received. So, where a man has paid a debt, which would otherwiſe have been barred by the ſtatute of limitations; or a debt contracted during his infancy, which in juſtice he ought to diſcharge, though the law would not have compelled the payment, yet the money being paid, it will not oblige the payee to refund it. But where money is paid under a miſtake, which there was no ground to claim in conſcience, the party may recover it back again by this kind of action. (*f*)

So, in the caſe of *Cartwright* v. *Rowley*, (*g*) which was an action of *aſſumpſit* for money had and received. The plaintiff

(*d*) *B. R. M.* 39. Geo. III. 2 *Eaſt Rep.* 471. *n. a.*
(*e*) Taylor v. Hare, 1 *New Rep. C. B.* 260.
(*f*) Per *Lord* Mansfield, 1 *Term Rep.* 286. *See alſo* 2 *Bl. Rep.* 825. 3 *Bur.* 1012. (*g*) 2 *Eſp. Rep.* 723.

was

was a patentee of a ſteam engine, and had employed the defendant, who was an engine maker, to make ſome engines for him, under the patent: in the progreſs of the work, the plaintiff had advanced ſeveral ſums of money to the defendant, which he ſought now to recover back on the ground that the defendant had been ſo inattentive to the order, and ſo long in completing the engines, that the opportunity of diſpoſing of them was loſt, ſo that they became uſeleſs to the plaintiff. The ground relied upon to eſtabliſh the plaintiff's right to recover in this action was, that the money was paid without any conſideration; the work, for which it had been given, having been rendered, by the defendant's own default, of no value to the plaintiff.

But Lord *Kenyon*, Ch. J. ſaid: "This action cannot be maintained, nor the money recovered back again by it: it has been paid by the plaintiff *voluntarily*; and where the money has been ſo paid, it muſt be taken to be properly and legally paid; nor can money be recovered back again by this form of action, unleſs there are ſome circumſtances to ſhow that the plaintiff paid it through miſtake, or in conſequence of coercion."

So, in the caſe of *Knibbs* v. *Hall*, (*b*) which was an action of *aſſumpſit* for uſe and occupation of chambers. The defendant pleaded *non aſſumpſit*, with a notice of ſet-off for *money had and received*. One article of the ſet-off, which the defendant propoſed to give in evidence, aroſe in the following manner. The defendant being indebted to the plaintiff for the rent of other chambers belonging to the plaintiff, which he then occupied, the plaintiff demanded payment at the rate of 25 guineas *per annum*. The defendant inſiſted that he had taken them at 20 guineas *per annum* only, and offered to pay at that rate. The plaintiff refuſed to take it, and threatened to diſtrain if not paid at the rate of 25 guineas: the defendant, in order to avoid the diſtreſs, paid at that rate, and now brought a witneſs to prove that the chambers, for which he had paid at the rate of 25 guineas, were really let at 20 guineas, ſo that he had overpaid the plaintiff, and therefore propoſed to ſet-off the overplus, as having been paid by compulſion, and in his own wrong.

(*b*) 1 *Eſp. Rep.* 84.

But

But Lord *Kenyon*, Ch. J. was opinion, that this could not be deemed a payment by compulſion, as the defendant might, by a replevin, have defended himſelf againſt the diſtreſs: that therefore after a *voluntary payment*, ſo made, he ſhould not be allowed to diſpute its legality; and therefore rejected the evidence.

3. *Of Money had and received by Deceit, or malâ fide.*] If money be received by deceit or *malâ fide*, it may be recovered back by action of *indebitatus aſſumpſit* for money had and received.

Thus, in the caſe of *Haſſer* v. *Wallis*, (*i*) the plaintiff being a *feme ſole* married the defendant *Wallis*, who was in truth married to another woman: *Wallis* made a leaſe of the wife's land, reſerving rent, and received the rents from the tenants. The plaintiff afterwards diſcovering the former marriage, brought this action of *indebitatus aſſumpſit* againſt *Wallis* for ſo much money had and received to her uſe. And after verdict on *non aſſumpſit*, it was objected, that *Wallis* having no right to receive, the tenant was not diſcharged, and therefore an action lay againſt the tenant, who had his remedy over againſt *Wallis*. But the court decided, that *Wallis* was viſibly a huſband, and the tenant diſcharged; at leaſt, that the recovery againſt *Wallis* in this action would diſcharge the tenant, for this would be a ſatisfaction to the leſſor.

So, in the caſe of *Thomas* v. *Whip*, (*k*) where a woman was nurſe to the plaintiff's inteſtate, and when he died went off with the money he had about him. *Parker*, Ch. J. held, that an action will well lie for money had and received to the plaintiff's uſe; for (he ſaid) he would preſume a ſubſequent agreement to make a contract of it; and the bringing the action is an admiſſion of ſuch conſent. And he ſaid, he knew but of two caſes where the plaintiff had not ſuch election, the one was in caſe of money won at play, and the other in caſe of money paid by a bankrupt (though on valuable conſideration) after the act of bankruptcy committed; in either of which caſes the action muſt be trover, for you cannot confirm the act in part, and impeach it for the reſt. And Lord

(*i*) 1 *Salk* 28. 11 *Mod.* 146. *Holt.* 36. *S. C.*
(*k*) *Trin.* 1 Geo. I. *Bul. N. P.* 130.

Hardwicke

Hardwicke (mentioning this caſe) ſaid, he always ſo held it, and had nonſuited many plaintiffs in actions of *aſſumpſit* under ſuch circumſtances.

So, if a ſon having a general authority to receive and pay money for his father, receive money due on a bill to his father, and give a receipt for it, as money had to his father's uſe, and after give it away, the father may bring trover againſt the donee; for his ſon's receipt is a good diſcharge of the debt, and therefore his poſſeſſion is the poſſeſſion of the father; the ſon being, as to this purpoſe, his ſervant; and the ſon may, in this caſe, be a witneſs (to prove the delivery to the defendant,) his evidence being corroborated by other circumſtances. (*l*)

8. *Of Money Had and Received under legal Proceſs, &c.*

Where money has been recovered by the judgment of a court having competent juriſdiction, the matter can never be brought over again by a new action: For until the judgment is ſet aſide or reverſed it is concluſive, as to the ſubject matter of it, to all intents and purpoſes. (*m*) Therefore, money paid under the compulſion of legal proceſs, though it be afterwards diſcovered not to have been due, cannot be recovered back.

Thus, in the caſe of *Marriot* v. *Hampton*, (*n*) where it appeared, that the defendant formerly brought an action againſt the preſent plaintiff for goods ſold, for which the plaintiffs had before paid, and obtained the defendant's receipt; but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to ſubmit and pay the money again, and he gave a *cognovit* for the coſts. The plaintiff afterwards found the receipt, and brought this action for money had and received, in order to recover back the amount of the ſum ſo wrongfully enforced in payment. But Lord *Kenyon*, Ch. J. was of opinion, at the trial, that after the money had been paid under legal proceſs it could not be recovered back again, however unconſcientiouſly retained by the defendant,

(*l*) 1 *Salk* 289. *Bul. N. P.* 35. (*m*) Per *Lord* Mansfield, 3 *Bur.* 1009.
(*n*) 7 *Term Rep.* 269. 2 *Eſp.* 546. *S. C.* Vide 1 *Vin. Abr.* 269.

though

though the caſe of *Moſes* v. *Macferlan*, 2 *Bur.* 1009,* was referred to; and thereupon the plaintiff was nonſuited.

A motion, however, was made for a rule to ſet aſide the nonſuit, and for a new trial; the counſel for the defendant relying on a ſubſequent caſe of *Liveſay* v. *Rider*, *Eaſt* 22 *Geo.* III. *B. R.*, where, on a ſimilar motion, the court held ſuch an action maintainable. And he preſſed for the opinion of the court in order that the queſtion might be ſettled.

Lord *Kenyon*, Ch. J. ſaid: "I am afraid of a ſuch a precedent. If this action could be maintained I know not what cauſe of action could ever be at reſt. After a recovery by proceſs of law there muſt be an end of litigation, otherwiſe there would be no ſecurity for any perſon. I cannot therefore conſent, even to grant a rule to ſhow cauſe, leſt it ſhould ſeem to imply a doubt. It often happens that new trials are applied for on the ground of evidence ſuppoſed to have been diſcovered after the trial; and they are as often refuſed: but this goes much further." The rule was accordingly refuſed.

So, in the caſe of *Brown* v. *M'Kinally*, (o) which was an action of *aſſumpſit* for money had and received. The plaintiff and defendant being in the ſame line of buſineſs, entered into an agreement by which the defendant agreed to ſell the plaintiff all his old iron, except buſhel iron, which was of an inferior quality, at 9*l. per* ton. The iron he delivered was mixed iron of an inferior value, being part buſhel iron, and charged the full value for the beſt ſort: the plaintiff objecting to the charge, the now defendant brought an action for it. The plaintiff paid the full demand ſo made on him, at the ſame time telling the defendant, that he did it without prejudice, and meant to bring an action to recover back the overplus ſo paid: and this action was accordingly brought for that purpoſe.

When the caſe was opened by the plaintiff's counſel, Lord *Kenyon* ſaid, that ſuch an action could not be maintained. That to allow it would be to try every ſuch queſtion twice, for that the ſame legal ground that would entitle the plaintiff to recover in the preſent action, would have been a good defence to the action brought againſt him, by the preſent defendant; at which time, and in which manner he ſhould have proceeded: that money

(*) *Vide poſt*, 46. (o) 1 *Eſp. Rep.* 279.

paid

paid by miſtake was recoverable in *aſſumpſit*, but here it was paid *voluntarily*, and ſo could not be recovered under the circumſtances of this caſe.

It has, however, been determined, that where money was recovered upon a judgment of a court of conſcience, in conſequence of a material part of the defendant's caſe having been rejected, which could not be gone into in that court, though from which it plainly appeared that the plaintiff ought not in conſcience and equity to have recovered the money, the judgment, in ſuch caſe, is not concluſive, but the party paying the money under it, may recover it back again by action of *indebitatus aſſumpſit*.

Thus, in the caſe of *Moſes* v. *Macferlan*, (*p*) which was an action of *indebitatus aſſumpſit* for money had and received. The caſe, as it came out in evidence, at the trial, was as follows: *Moſes* (the plaintiff) had indorſed to the defendant, *Macferlan*, four ſeveral promiſſory notes made to *Moſes* himſelf, by one *Chapman Jacob*, for 30*s*. each, for value received, bearing date 7th of *November*, 1758.: and that this was done in order to enable the defendant, *Macferlan* to recover the money, in his own name, againſt *Chapman Jacob*. But previous to the now plaintiff's indorſing theſe notes, *Macferlan* aſſured him, "that ſuch his indorſement ſhould be of no prejudice to him:" and there was an agreement ſigned by *Macferlan*, whereby he (amongſt other things) expreſsly agreed, "that *Moſes* ſhould not be liable "to the payment of the money, or any part of it; and that he "ſhould not be prejudiced, or be put to any coſts, or any way ſuffer "by reaſon of ſuch his indorſement." Notwithſtanding which expreſs condition and agreement, and contrary thereto, the preſent defendant, *Macferlan*, ſummoned the preſent plaintiff, *Moſes*, into the court of conſcience, upon each of theſe four notes, as the indorſer thereof reſpectively, by four ſeparate ſummonſes. Whereupon *Moſes*, (by one *Smith*, who attended the court of conſcience, at their ſecond court, as ſolicitor for him and on his behalf,) tendered the ſaid indemnity to the court of conſcience, upon the firſt of the ſaid four cauſes; and offered to give evidence of it, and of the ſaid agreement, by way of defence for

(*p*) 2 *Bur.* 1005. 1 *Bl. Rep.* 219 *S. C. But ſee* 2 *H. Bl.* 416. *where it is ſaid by* Eyre, *Ch. J.* "*That the judgment pronounced in this caſe did not* "*ſatisfy* Weſtminſter Hall *at the time; that he never could ſubſcribe to it;* "*it ſeemed to him to unſettle foundations.*"

Moſes

Moſes in that court. But that court rejected this defence, and refuſed to receive any evidence in proof of this agreement of indemnity, thinking that they had no power to judge of it; and gave judgment againſt *Moſes*, upon the mere foot of his indorſement, (which he himſelf did not at all diſpute,) without hearing his witneſſes about the agreement, that he ſhould not be liable: for the commiſſioners held this agreement to be no ſufficient bar to the ſuit in their court, and conſequently decreed for the plaintiff in that court, upon the undiſputed indorſement made by *Moſes*. This decree was actually pronounced in only one of the four cauſes there depending: but *Moſes*'s agent (finding the opinion of the commiſſioners to be as above-mentioned,) paid the money into that court, upon all the four notes; and it was taken out of court by the now defendant, *Macferlan*, (the then plaintiff in that court,) by order of the commiſſioners.

All this matter appearing in evidence at the trial, there was no doubt but that upon the merits *Moſes* was entitled to recover back the money, and accordingly a verdict was given for him; but ſubject to the opinion of the court upon this queſtion, whether the money could be recovered in that form of action, or whether an action ought to have been brought upon the ſpecial agreement only? The court were unanimouſly of opinion, that the giſt of the action was that the defendant, upon the circumſtances of the caſe, was obliged, by the ties of natural juſtice and equity, to refund the money; therefore, that the plaintiff might elect to wave any demand upon the foot of the indemnity for the coſts he had been put to, and bring his action of *indebitatus aſſumpſit* to recover the 6*l.* which the defendant had unjuſtly received.

Lord *Mansfield*, Ch. J., in delivering the opinion of the court, ſaid: "It is moſt clear that the merits of a judgment can never be over-haled by an original ſuit, either at law or in equity. Till the judgment is ſet aſide or reverſed, it is concluſive, as to the ſubject matter of it, to all intents and purpoſes. But the ground of this action is conſiſtent with the judgment of the court of conſcience: it admits the commiſſioners did right. They decreed upon the indorſement of the notes by the plaintiff: which indorſement is not now diſputed. The ground upon which this action proceeds was no defence againſt that ſentence. It is enough for us, that the commiſſioners adjudged they had no cogniſance of

of ſuch collateral matter. We cannot correct an error in their proceedings; and ought to ſuppoſe what is done by a final juriſdiction to be right. But we think the commiſſioners did right in refuſing to go into ſuch collateral matter. Otherwiſe, by way of defence againſt a promiſſory note for 30*s.*, they might go into agreements and tranſactions of a great value: and if they decreed payment of the note, their judgment might indirectly conclude the balance of a large account. The ground of this action is not, that the judgment is wrong; but, that (for a reaſon which the now plaintiff could not avail himſelf of againſt that judgment,) the defendant ought not in juſtice, to keep the money. And at *Guildhall*, I declared very particularly, that the merits of a queſtion, determined by the commiſſioners, where they had juriſdiction, never could be brought over again, in any ſhape whatſoever. Money may be recovered by a right and legal judgment; and yet the iniquity of keeping that money may be manifeſt, upon grounds which could not be uſed by way of defence againſt the judgment. Suppoſe an indorſee of a promiſſory note, having received payment from the drawer (or maker) of it, ſues and recovers the ſame money from the indorſer, who knew nothing of ſuch payment. Suppoſe a man recovers upon a policy for a ſhip preſumed to be loſt, which afterwards comes home; or upon the life of a man preſumed to be dead, who afterwards appears; or upon a repreſentation of a riſk deemed to be fair, which comes out afterwards to be groſsly fraudulent. But there is no occaſion to go further: for the admiſſion that, unqueſtionably, an action might be brought upon the agreement, is a deciſive anſwer to any objection from the judgment. For it is the ſame thing, as to the force and validity of the judgment, and it is juſt equally affected by the action, whether the plaintiff brings it upon the equity of his caſe ariſing out of the agreement, that the defendant may refund the money he received; or, upon the agreement itſelf, that beſides refunding the money, he may pay the coſts and expences the plaintiff was put to. The gift of this kind of action is, that the defendant, upon the circumſtances of the caſe, is obliged by the ties of natural juſtice and equity to refund the money. Therefore we are all of us of opinion, that the plaintiff might elect to wave any demand upon the foot of the indemnity, for the coſts he had been put to; and bring this action to recover the 6*l.*, which the defendant got and kept from him iniquitouſly."

So,

So, where an action is brought, and the money is paid under a compromiſe, and not in conſequence of a judgment of the court; and it is afterwards diſcovered that the money was paid by miſtake or deceit, it may be recovered back by action of *indebitatus aſſumpſit* for money had and received.

Thus, in the caſe of *Cobden* v. *Kendrick*, (*q*) where the following facts appeared: An action had been brought ſome time before by the preſent defendant, as indorſee of a promiſſory note for 150*l.* againſt the preſent plaintiff as the maker; in which cauſe interlocutory judgment had been ſigned, and a writ of inquiry executed; after which the cauſe was compromiſed by *Cobden*'s paying part, and giving a warrant of attorney to confeſs judgment for the reſidue of the 150*l.* And in the interval between the time when the warrant of attorney was given, and the time when the money became due, according to the defeaſance thereof, *Kendrick* told *Allen*, who was his attorney in that ſuit, that he was glad it was ſettled, for that he had only given 10*l.* in caſh, and his promiſſory note for it; and that he knew it was a lottery tranſaction. This action was now brought to recover back the money ſo paid, on the ground of want of conſideration; and in proof that that was known to *Kendrick* at the time he took the note. *Allen* was called as a witneſs to ſpeak to the converſation above-mentioned, and he was admitted, after argument upon his incompetency, and a verdict paſſed for the plaintiff. An objection was alſo taken at the trial,* that this action was in effect to put the ſame ſum in litigation a ſecond time, which had been recovered in the former action by *Kendrick* againſt *Cobden*; but Lord *Kenyon*, Ch. J. over-ruled it on the ground, that the money had been paid under a compromiſe, and not under the judgment of a court.

9. *Of Money Had and Received under a void Authority, whether judicial or otherwiſe.*

When money is paid under a void authority, an action of *indebitatus aſſumpſit* for money had and received lies to recover it back.

(*q*) 4 *Term Rep.* 431. * *Ibid.* 432. *a. a.*

Thus, in the caſe of Sir *Richard Newdigate* v. *Davy*, (*r*) the following facts were proved: Sir *Richard Newdigate*, the plaintiff, had a donative which he gave to the defendant, *Davy*; and afterwards he removed *Davy*, and put in *J. S. Davy* cited Sir *Richard Newdigate* in the time of *James* II. before the high commiſſioners, and their Sir *Richard Newdigate* had ſentence againſt him to reſtore *Davy*, and to pay him all the arrears that he had received: Sir *Richard Newdigate* paid it accordingly. And after the revolution Sir *Richard Newdigate* brought *indebitatus aſſumpſit* againſt *Davy* for this money, as received to his uſe. *Treby*, Ch. J., before whom the cauſe was tried, held that the action well lay; for when money is paid in purſuance of a void authority, &c. *indebitatus aſſumpſit* lies for it.

So, in the caſe of *Feltham* v. *Terry*, (*s*) where an action for money had and received was brought againſt an overſeer of the poor, to recover money in his hands which had been levied on a conviction, but that conviction was afterwards quaſhed; and the court held that the action was maintainable for the clear money in the defendant's hands, becauſe the plaintiff might wave the tort, and ſue for the clear money really due.

So where *A.* took out adminiſtration to a perſon ſuppoſed to have died inteſtate, and appointed *J. S.* his attorney, who received money, &c. and paid it to the adminiſtrator; afterwards a will appearing, the letters of adminiſtration were called in, and the executor brought an *indebitatus aſſumpſit* againſt the attorney, who objected, 1ſt, That he acting only as an attorney for *A.*, who in fact was adminiſtrator, the receipt of the money was not his but the adminiſtrator's: and 2dly, That the action ought to have been a *ſpecial aſſumpſit*, the money being received by ſpecial authority, and that expreſsly to the uſe of another. But *Trevor*, Ch. J. held, (*t*) that the authority being void, it was a receipt of ſo much money for the uſe of the plaintiff on an implied contract, for which an *indebitatus aſſumpſit* well lies.

(*r*) 1 *Ld. Raym.* 742. *Bul. N. P.* 133. *S. C.*

(*s*) *Loft.* 207. *and cited in Cowp.* 419. 1 *Term Rep.* 387. Vide 2 *Ld. Raym.* 1216. *S. P.* Sed vide 1 *Ld. Raym.* 742. *contra.*

(*t*) 1 *Salk.* 27. *pl.* 14. *But ſee Ld. Raym.* 1210. *and* 4 *Bur.* 1986. contra.

But

But in the caſe of *Allen* v. *Dundas*, (v) it was determined, that an authority given by a court, having competent juriſdiction, is not a void authority, though it may be afterwards vacated: therefore where *A.* ſtood indebted to *B.* for money had and received, and B. dies, after whoſe death *C.* obtains probate of a forged will, and *A.* not knowing of this circumſtance pays the money over to him as executor, no action will lie to recover back the money ſo paid, notwithſtanding the probate be afterwards declared null, and adminiſtration be granted to the inteſtate's next of kin: but if the ſuppoſed teſtator be living at the time of granting the probate, ſuch action will lie, for in that caſe the authority is void, the eccleſiaſtical court having no juriſdiction. And in all caſes where the authority is abſolutely void, a payment made under it is no diſcharge. As where the defendant, who had a houſe both in *America* and *London*, drew bills in *America* of the ſame tenor and date on their houſe, in favour of the plaintiffs; one of them being loſt, it came into the hands of a third perſon, who forged an indorſement in the name of the payee, and received the amount of it from the defendants: afterwards the real payees ſued them on the other bill and recovered.*

Where *A.* pays a debt which he owes to *B.* to the attorney of a perſon ſuing *A.* in *B.*'s name, but without any authority from *B.*, *A.* is ſtill liable to *B.*, and the attorney is anſwerable to *A.* in an action for money had and received, though he has actually paid over the money to his employer; and though he conceived that he was acting under the real authority of *B.*: but in point of fact the perſon who had employed him had forged a power of attorney in *B.*'s name. (u)

In the caſe of *Lindon* v. *Hooper*, (w) it was determined, that an action for money had and received does not lie to recover back money paid for the releaſe of cattle diſtrained *damage feaſant*, though the diſtreſs were wrongful; the proper remedy being either by a replevin, or by action of treſpaſs *vi et armis*.

(v) 3 *Term Rep.* 125. * *Ibid.* 127. (u) Robſon v. Eaton, 1 *Term Rep.* 62. (w) *Cowp.* 414.

19. *Of Money Had and Received upon a Conſideration which has failed; or upon a Contract which has been Reſcinded, or not Performed, &c.*

Wherever a man has received money upon a conſideration which happens to fail, the perſon from whom it is received may recover it back by action of *indebitatus aſſumpſit*, as money had and received to his uſe. (*x*)

It is intended to conſider the caſes on this ſubject under the following heads:

1. *Of Money depoſited upon a Contract for the Sale of Lands, Houſes, &c.*
2. *Of Money Paid on the Purchaſe of Annuities.*
3. *Of Money Received upon other Contracts, which have been Reſcinded, or not Performed, &c.*

1. *Of Money depoſited upon a Contract for the Sale of lands, houſes, &c.*] If, upon a contract for the ſale of lands, houſes, &c. the vendee makes a depoſit of the whole, or part of the purchaſe-money with the vendor, or his agent, and the vendor's title happens to be defective, or if the premiſes vary from the deſcription contained in the particulars of ſale, the vendee may not only refuſe to complete the purchaſe, but he may alſo recover back his depoſit by action of *indebitatus aſſumpſit*, as for ſo much money had and received to his uſe.

Thus, in the caſe of *Burrough* v. *Skinner*, (*y*) which was an action of *indebitatus aſſumpſit* for money had and received by the defendant, who was an auctioneer, and in that character had ſold to the plaintiff an intereſt in land, for which the plaintiff had paid him a depoſit of 50*l.*; but, upon an objection to the title, and the want of diſcloſure of certain circumſtances, which ought to have been diſcloſed at the time of the bidding, the plaintiff (the purchaſer) declined going on with the contract: and, in the

(*x*) Per Aſhhurſt *Juſt.* 2 *Term Rep.* 369.
(*y*) 5 *Bur.* 2639. et vide ante, *tit.* Principal, Factor, and Agent, 1 *vol. p.* 255.

opinion

opinion of the Court, ſhe had ſufficient reaſon for ſo doing. She therefore required the defendant (the auctioneer) to pay her back his depoſit of 50*l.* which he refuſed. Whereupon the bidder brought this action againſt him, to recover it. He paid 8*l.* into court. The cauſe was tried; and the plaintiff obtained a verdict. The defendant, however, moved for a new trial; but, upon ſhowing cauſe, the Court were clearly of opinion that the action lay againſt the auctioneer; and ſaid, "The money does not appear to have been paid over by him to his principal: but if it had been ſo, yet the objection appears to have been made before it either was or ought to have been ſo paid over. He was a ſtake-holder, a mere depoſitory of the 50*l.*, and ought not to have parted with it till ſuch time as the ſale ſhould be finiſhed and completed, and it ſhould appear, in the event, to whom it properly belonged.

And, in the caſe of *Flureau* v. *Thornhill*, (z) it was held that the vendee, in an action for money had and received againſt the vendor, for the depoſit money, might recover the depoſit with intereſt; but that he could not recover any damages for the loſs of his bargain.

If, however, the vendee has been put to any expence, and has incurred any particular loſs or damage, in conſequence of the vendor's not making a good title, ſuch expence and damage may be recovered againſt the vendor by action of *aſſumpſit*, ſtating the contract, the breach, and the damages, &c. ſpecially. (a)

Where a purchaſe is made which conſiſts of ſeveral lots of houſes, if, from the nature of the contract, it be entire, the vendor muſt make a complete title to the whole, otherwiſe the vendee may reſcind the contract, and recover back his depoſit by action of *indebitatus aſſumpſit* for money had and received.

Thus, in the caſe of *Chambers* v. *Griffiths* and others, (b) which was an action of *indebitatus aſſumpſit* for money had and received, brought to recover back the amount of a depoſit made by the plaintiff, on a ſale by auction of ſeveral houſes of the defendants. And the caſe in evidence was, that the houſes in queſtion had,

(z) 2 *Bl. Rep.* 1078.
(a) *Vide* Richards v. Barton, 1 *Eſp. Rep.* 268. Camfield v. Gilbert, 4 *Eſp. Rep.* 223. (b) 1 *Eſp. Rep.* 150.

with ſeveral others, been put up by public auction, in diſtinct lots; the plaintiff had bid for three of theſe lots, which had been knocked down to him; and he had paid the depoſit for them required by the conditions of ſale. One of the conditions was, that the purchaſer was to have a good title made to him, within a month after the ſale. Within the month the defendant ſent an abſtract of the title, but it was to one of the houſes only. The plaintiff inſiſted upon having a title made to him for the other two houſes, or of reſcinding the agreement for the whole purchaſe. The defendants were willing to ſuffer the plaintiff to abandon his purchaſe of the two houſes to which they had not ſent an abſtract, but inſiſted on holding him to his agreement for the houſe to which they had ſhown a good and ſufficient title. The plaintiff refuſed theſe terms, and brought his action to recover back the whole of the depoſit money. The defendants had paid into court the amount of the depoſit paid to them for the two houſes. The queſtion therefore was, whether the plaintiff had a right to conſider the contract as at an end, or to recover his depoſit for the houſe to which the defendants had made a title, the defendants having failed in making any title to the others.

Lord *Kenyon*, Ch. J. ſaid, "When a party purchaſes ſeveral lots of this deſcription, at an auction, it muſt be taken as an entire contract; that is, that the ſeveral lots are purchaſed with a view of making them a joint concern. The ſeller, therefore, ſhall not, in caſe of any defect of his title to one part, be allowed to abandon that part at his pleaſure, and to hold the purchaſer to his bargain for the reſidue. From ſuch a doctrine much injuſtice might reſult, as the part to which the ſeller could not make a title might be ſo circumſtanced that, without it, the other parts would be of little, or perhaps of no value; or it might leave it in the power of the ſeller, or any other perſon who might come to the poſſeſſion of ſuch part, to deprive the purchaſer of every degree of enjoyment or beneficial uſe of that part which he had purchaſed:" and his lordſhip added, "That a caſe under circumſtances preciſely ſimilar to the preſent had been decided before him, when he was maſter of the rolls; that, on that caſe coming before him, he had found that his predeceſſor there, Sir *Thomas Sewell*, had ruled, contrary to the doctrine he was now delivering, but that he at the rolls had over-ruled Sir *Thomas Sewell's*

ell's determination, with the general approbation of the bar. In the preſent caſe, therefore, as the defendant had failed in making any title to the two lots in queſtion, the plaintiff had by law a right to reſcind the agreement as to the whole, and, of courſe, to recover his depoſit."

But in the caſe of *Joſeph Johnſon* v. *John Johnſon*, (*c*) where truſtees under a will ſold to the plaintiff, (he being one of the truſtees, and alſo one of ſeveral legatees,) *two parcels of land*, by private contract, for *two diſtinct ſums of money*, with the conſent, and by the expreſs agreement of all the legatees, who were reſpectively entitled to equal ſhares of the purchaſe money, and which were duly paid to them: but after the contract had been thus far carried into execution, and after the purchaſer was in poſſeſſion of the land, it was diſcovered that there was ſome defect of title to one of the parcels, and, in conſequence of which, an ejectment was brought by the perſon claiming title, and he recovered; and the plaintiff, who had paid the purchaſe money but to whom no conveyance had been made, was not only evicted from the poſſeſſion, but was obliged to refund the rent and profits of that particular parcel of land. Several of the perſons intereſted conſented to repay their proportions of the purchaſe money; but ſome (among whom was the preſent defendant) refuſed; and the queſtion was, whether, under theſe circumſtances, the plaintiff was entitled to recover his proportion in an action of *indebitatus aſſumpſit* for money had and received, and retain poſſeſſion of the other piece of land?

The Court of *Common Pleas* were of opinion that the plaintiff was entitled to recover againſt the defendant his proportion of the purchaſe money in this form of action, and alſo to retain poſſeſſion of the other piece of land: and Lord *Alvanley*, Ch. J. in delivering the opinion of the Court, ſaid, "As this is not a caſe between an executor and a legatee, in which the former ſeeks to recover the amount of any legacy paid to the latter, but between the purchaſer and vendor of an eſtate, my difficulty has been, how far the agreement is to be conſidered as one contract for the purchaſe of both ſets of premiſes, and how far the party can recover ſo much as he has paid by way of conſideration for the part of which the title has failed, and retain the other part of the bargain. This, for a time, occaſioned doubts in my mind: for if the latter queſtion were involved in this caſe, it would be a ſubject for a court

(*c*) 3 *Boſ. and Pul.* 162.

of equity. If the queſtion were, how far the particular part of which the title has failed formed an eſſential ingredient of the bargain, the groſſeſt injuſtice would enſue, if a party were ſuffered in a court of law to ſay that he would retain all of which the title was good, and recover a proportionable part of the purchaſe money for the reſt. Poſſibly the part which he retains might not have been ſold unleſs the other part had been taken at the ſame time, and ought not to be valued in proportion to its extent, but according to the various circumſtances connected with it. But a court of equity may inquire into all the circumſtances, and may aſcertain how far one part of the bargain formed a material ground for the reſt, and may award a compenſation, according to the real ſtate of the tranſaction. In this caſe, however, no ſuch queſtion ariſes: for it appears to me that, although both pieces of ground were bargained for at the ſame time, we muſt conſider the bargain as conſiſting of two diſtinct contracts; and that the one part was ſold for 300*l.* and the other for 700*l.* It has not been ſuggeſted that they were neceſſary to the occupation of each other. It amounts therefore to no more than this; that the plaintiff being one of the executors, who were about to ſell the houſe, and alſo to ſell the land, to both of which the legatees undertook to make a good title, advanced his money to the legatees on the purchaſe of theſe two lots, and now ſeeks to recover back the money for one of them, becauſe the title to that has proved defective. We by no means wiſh to be underſtood to intimate that where, under a contract of ſale, a vendor does legally convey all the title which is in him, and that title turns out to be defective, the purchaſer can ſue the vendor in an action for money had and received. Every purchaſer may protect his purchaſe by proper covenants. Where the vendor's title is actually conveyed to the purchaſer, the rule of *caveat emptor* applies. In the preſent caſe the plaintiff never has had any title conveyed to him; and therefore we are of opinion, notwithſtanding the party ſued is a legatee, that the plaintiff has paid his money under a miſtake; conſequently, the rule adopted in courts of law in ſuch caſes applies to him, and entitles him to recover that money from the party to whom it has been paid, in an action for money had and received."

If, however, there be but *one* contract, it cannot be reſcinded by one of the parties for the default of the other, unleſs both of them can be put in *ſtatu quo* as before the contract.

Thus,

Thus, in the caſe of *Hunt* v. *Silk*, (*d*) which was alſo an action of *indebitatus aſſumpſit*, for money had and received. The facts were theſe:—On the 31ſt *Auguſt*, 1802, an agreement of that date was made between the parties, whereby the defendant, in conſideration of 10*l.* to be paid at the time of executing the leaſe after mentioned, and for other conſiderations therein ſtated, agreed that, within ten days from the date thereof, he would grant to the plaintiff a leaſe of a certain dwelling-houſe, for nineteen years (determinable by the plaintiff in five, ten, or fifteen years), from the 29th of *September* then next (but poſſeſſion to be immediately given to the plaintiff,) at the yearly rent of 63*l.* And the defendant alſo agreed, at his own expence, to make certain alterations in the premiſes, and that the premiſes, fixtures, and things ſhould, at the time of executing the leaſe, be put in complete repair: and the plaintiff, in conſideration thereof, agreed to accept the leaſe at the rent, and in the manner aforeſaid, and to execute a counter-part, and pay the rent. The plaintiff took immediate poſſeſſion of the premiſes under the agreement, and paid the 10*l.* at the ſame time, in confidence that the alterations and repairs ſtipulated for would be done within the ten days; but that period after having elapſed, and nothing being done, notwithſtanding ſeveral applications to the defendant to perform the work, the plaintiff quitted the houſe, giving the defendant notice of his having reſcinded the agreement in conſequence of the defendant's default, and brought this action to recover back the money he had paid.

The Court of *King's Bench* were of opinion, that the plaintiff could not, under the circumſtances of this caſe, reſcind the contract, and declare in this general form of action.

Lord *Ellenborough*, Ch. J. ſaid, "Without queſtioning the authority of the caſe of *Giles* v. *Edward*, (*e*) (which was cited by the counſel for the plaintiff) which I admit to have been properly decided, there is this difference between that and the preſent; that there, by the terms of the agreement, the money was to be paid antecedent to the cording and delivery of the wood; and here it was not to be paid till the repairs were done, and the leaſe executed. The plaintiff there had no opportunity, by the terms

(*d*) 5 *Eaſt Rep.* 449. (*e*) *Vide poſt.*

of

of the contract, of making his ſtand, to ſee whether the agreement were performed by the other party before he paid his money, which the plaintiff in this caſe had: but inſtead of making his ſtand, as he might have done, on the defendant's non-performance of what he had undertaken to do, he waved his right, and voluntarily paid the money, giving the defendant credit for his future performance of the contract, and afterwards continued in poſſeſſion, notwithſtanding the defendant's default. Now where a contract is to be reſcinded at all, it muſt be reſcinded *in toto*, and the parties put *in ſtatu quo*. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being reſcinded. If the plaintiff might occupy the premiſes two days beyond the time when the repairs were to have been done, and the leaſe executed, and yet reſcind the contract, why might not he reſcind it after a twelvemonth, on the ſame account? This objection cannot be gotten rid of: the parties cannot be put in *ſtatu quo*."

Where money is paid by way of depoſit on a contract for the ſale of *leaſehold* premiſes; and, upon examining the vendor's title, it ſhould appear that he has a leſs term of years to come than what is mentioned in the agreement, or his title be otherwiſe defective, the purchaſer may conſider the contract at an end, and bring an action for money had and received, to recover back his depoſit.

Thus, in the caſe of *Farrer* v. *Nightingal*, (*f*) which was an action of *indebitatus aſſumpſit* for money had and received. The facts are reported as follow:—"The defendant being poſſeſſed of a public houſe, the plaintiff entered into a treaty with him for the ſale of his intereſt; and a written agreement was accordingly entered into between the plaintiff and the defendant, which recited that the defendant was poſſeſſed of an intereſt in a public-houſe of which eight years and a half were to come; and that the plaintiff had contracted and agreed for the purchaſe of the intereſt and good will of the ſame, for a certain ſum of money therein mentioned. The plaintiff paid a depoſit of 5*l.* to the defendant, on ſigning the agreement; but afterwards, upon looking into the defendant's title, it appeared that he had an intereſt to come in the premiſes,

(*f*) 2 *Eſp. Rep.* 639.

of

of but ſix years only; and not of eight years and a half, as ſtated in the agreement; upon which the plaintiff refuſed to accept the aſſignment, and brought the preſent action to recover the depoſit money"

For the defendant it was objected, that as there had been a written agreement between the parties, the plaintiffs ſhould have declared on it, and ſhould not be permitted, in this action, to go into parol evidence of the matters contained in it; which matters were neceſſary to the ſupport of the plaintiff's action.

Lord *Kenyon*, Ch. J. ſaid, "I have often ruled, that where a perſon ſells an intereſt, and it appears that the intereſt which he pretended to ſell was not the true one; as for example, if it was for a leſs number of years than he had contracted for to ſell, the buyer may conſider the contract as at an end, and bring an action for money had and received to recover back any ſum of money he may have paid in part performance of the agreement for the ſale, and though it is ſaid here that, upon the miſtake being diſcovered in the number of years of which the defendant ſtated himſelf to be poſſeſſed, he offered to make an allowance *pro tanto*, that makes no difference in the caſe; it is ſufficient for the plaintiff to ſay, that is not the intereſt which I agreed to purchaſe. The plaintiff's action is well brought."

So, in the caſe of *Elliot* v. *Edwards* (*g*) which was an action of *indebitatus aſſumpſit*, brought to recover from the defendant, as auctioneer, the ſum of 45*l.* being the amount of a depoſit paid into his hands by the plaintiff, on the purchaſe of a leaſehold eſtate; and the facts were as follow:—*William Emblin* being poſſeſſed of a leaſe of certain premiſes, wherein he carried on a ſchool, agreed with *Morgan William Johnes* for the ſale of the ſaid leaſe, together with the good-will of the ſchool, for 1000*l.*, and certain goods and fixtures upon the premiſes to be paid for according to valuation. It was agreed that the ſaid 1000*l.*, together with the amount of the valuation of the ſaid goods and fixtures, ſhould form an aggregate ſum to be paid and ſecured by the ſaid *M. W. Johnes* to the ſaid *W. Emblin*, and that, on payment of 500*l.* part thereof, on the 25th of *December* then next, poſſeſſion of the leaſe and premiſes, goods, fixtures, and effects

(*g*) 3 *Boſ. and Pul.* 181.

ſhould

ſhould be delivered up, and abſolutely aſſigned to the ſaid *M. W. Johnes*. By indenture of the 7th of *January* 1801, between *William Emblin* of the firſt part, *M. W. Johnes* of the ſecond part, and *Matthias Pierce* of the third part, reciting the original leaſe to *William Emblin*, and the ſaid agreement, and that the goods and fixtures had been valued at 390*l.*, and that 500*l.* had been paid, in purſuance of the ſaid agreement, by the ſaid *M. W. Johnes*, to the ſaid *William Emblin*; the ſaid *William Emblin* aſſigned over the goods and fixtures abſolutely, and the leaſehold premiſes for the remainder of the term, ſubject to the rents, covenants, conditions, and agreements therein expreſſed and contained. The indenture contained the following proviſo: "Provided always, and theſe preſents are upon this condition nevertheleſs, that he the ſaid *M. W. Johnes*, his executors and adminiſtrators, ſhall not nor will, at any time or times hereafter, (until the money agreed to be paid and ſecured unto the ſaid *William Emblin*, his executors, adminiſtrators, and aſſigns, by the ſaid *M. W. Johnes*, his executors and adminiſtrators, amounting to 890*l.*, for the good-will and purchaſe of the ſaid goods and fixtures in the ſaid recited agreement contained, be paid and ſatisfied to the ſaid *William Emblin*, his executors and aſſigns; and for the due payment of which, the ſaid *M. Pierce* is the ſurety of the ſaid *M. W. Johnes*,) underlet, leaſe, aſſign, transfer, or ſet over unto any perſon or perſons, for all or any part of the ſaid term, in the ſaid recited indenture of leaſe mentioned, all or any part of the ſaid premiſes hereby aſſigned, without the joint licence and conſent of them the ſaid *William Emblin* and *Matthias Pierce*, in writing under their hands firſt had and obtained." The indenture alſo contained a covenant on the part of *M. W. Johnes* and *Matthias Pierce*, for themſelves, their executors, adminiſtrators, and aſſigns, for the payment of the remaining ſum of 890*l.* by inſtalments of 100*l.* each, on every ſucceſſive *Midſummer* and *Chriſtmas* day, and 90*l.* on the laſt inſtalment; with a proviſo that *Matthias Pierce* ſhould not be called upon until after two months' notice of the default of *M. W. Johnes*. The leaſehold premiſes above mentioned having been taken in execution under a *fieri facias* for a debt due from the ſaid *M. W. Johnes* to Meſſrs. *Smith* and Co. of 641*l.* 12*s.* were put to ſale by public auction, upon the 13th of *January* 1802. Among the terms of ſale was contained an article that the purchaſer ſhould pay down immediately a depoſit of

2 20*l.* *per*

20*l. per cent.* in part of the purchaſe money, and ſign an agreement for payment of the remainder on or before the 2d of *February*, 1802, on having a good title, when poſſeſſion would be given. The plaintiff became the purchaſer at ſuch ſale for the ſum of 260*l.*, and paid a depoſit of 45*l.*, but afterwards objecting to the title, he refuſed to complete the purchaſe, and brought this action to recover the depoſit.

The Court of *Common Pleas* held, that the non-payment of the purchaſe money by *Johnes* was a ſufficient objection to the title, and that the plaintiff might recover back his depoſit in this form of action.

Lord *Alvanley*, Ch. J. ſaid: "If the purchaſer would be liable in equity it is a ſufficient objection. Suppoſe a man, having purchaſed an eſtate, aſſign it before the purchaſe money has been paid, a court of equity will compel the aſſignee to pay that money, provided he knew, at the time of the aſſignment, that it had not been paid. Here *Johnes* obtained an aſſignment in conſideration of an undertaking to pay for the leaſe and fixtures; that conſideration money has not been paid. *Johnes* and *Pierce*, for themſelves and aſſigns, covenant for the payment of that money: and there is a proviſo that *Johnes* ſhall not aſſign, until that money has been paid, without the conſent of *Emblin* and *Pierce*. Does not that create an equitable incumbrance? I think that a court of equity would hold it ſo, though I do not know that it would be binding at law. Now what is the nature of the plaintiff's depoſit? It is not made upon the condition that the purchaſe ſhall be completed, free from all reaſonable objections? It is quite clear that a court of equity would not compel a ſpecific performance of the agreement for the purchaſe of theſe premiſes. If a bill were filed for that purpoſe it would be diſmiſſed with coſts. I think that the plaintiff has made out a reaſonable objection to the title offered by the defendant, and, conſequently, muſt recover his depoſit."

But, in the caſe of *Alpaſt* v. *Watkins*, (*b*) where under a limitation in a marriage ſettlement to the huſband for life, then to the wife for life, then to the heirs of the body of the wife and their heirs, the wife took an eſtate tail: and though it was recited in

(*b*) 8 *Term Rep.* 516.

the

the deed, that the husband's father conveyed in consideration of the marriage, and "for settling and establishing the lands, &c. to the uses thereafter expressed," and subsequent uses were added in the deed; the court will only take notice of the *legal* estate; and the husband and wife having levied a fine, and having agreed to sell the estate to a purchaser, from whom they had received part of the purchase money, it was determined that the purchaser could not recover back his deposit money in an action of *indebitatus assumpsit* for money had and received. And Lord *Kenyon*, Ch. J. said: "Sitting in a court of law we cannot take notice of an *equitable* title; and that the defendant could make a good *legal* title cannot be doubted. I am therefore clearly of opinion, that sitting in a court of law, we cannot do otherwise than determine that as the wife took an estate tail under this settlement, and as she and her husband have levied a fine, the defendant may make a good legal title to the plaintiff, and, consequently, is not liable to repay the deposit money for which this action is brought."

So, in an action for money had and received, to recover back a deposit made upon a sale, on the ground of a defect of title, the party bringing the action must prove the title bad, and it will not be sufficient to show that the title has been deemed insufficient by conveyancers, who have been employed to advise upon it.

Thus, in the case of *Camfield* v. *Gilbert*, (*i*) which was an action of *assumpsit* for money had and received, brought to recover the sum of 50*l.* which was the deposit paid by the plaintiff, on the purchase of an estate in *Kent*, contracted to be sold by the defendant to the plaintiff; the plaintiff contending, that the title was bad; and that he was entitled to recover his deposit.

At the trial, before Lord *Ellenborough*, Ch. J., the counsel for the plaintiff, after having stated that opinions of different conveyancers had been given on the title before the completing of the purchase, who were of opinion that the title was defective, and ought not to be taken by the plaintiff, asked his lordship whether it might not be sufficient for him to rely on the fact of such conveyancers advising the party not to complete the purchase? or whether it was necessary for him, on the part of the plaintiff, to go into the title, to show that it was defective, in order

(*i*) 4 *Esp. Rep.* 221. 3 *East Rep.* 516. *S. C.*

to

to entitle him to recover the depoſit, as being paid on a bad and defective title.

Lord *Ellenborough*, Ch. J. ſaid, "The plaintiff's right to recover the money depoſited depended on the defect of the title of the defendant to the premiſes, which he had contracted to ſell; and unleſs it was a bad title, he had no claim to recover. It would be therefore neceſſary for him to ſhow that the title was bad."

Where a perſonal repreſentative having found among the papers of his teſtator a mortgage deed, and having aſſigned it for upwards of ſix years for the mortgage money, affirming and reciting in the deed of aſſignment, that it was a mortgage deed made or mentioned to be made between the mortgagor and mortgagee for that ſum; it was decided, that the aſſignee could not recover back the mortgage money, although it ſhould turn out that the mortgage was a forgery, and that the aſſignee did not diſcover the forgery, till within ſix years before he brings his action, unleſs the aſſignor knew it to be a forgery. Lord *Manſfield*, Ch. J., in this caſe, ſaid: (*k*) "The queſtion is, whether there has been any fraud? Now, here every thing alleged may be true, without any fraud on the part of the defendant. He is an adminiſtrator with the will annexed, who finds a mortgage deed among the papers of his teſtator, without any arrears of intereſt, and parts with it *bonâ fide*, as a marketable commodity. If he had diſcovered the forgery, and had then got rid of the deed as a true ſecurity, the caſe would have been very different. He did not covenant for the goodneſs of the title, but only that neither he nor the teſtator had incumbered the eſtate. It was incumbent on the plaintiff to look to the goodneſs of it."

But, where a perſon, ſuppoſing himſelf the legal repreſentative of a leſſee for years, ſold the term and delivered the leaſe, but without any aſſignment or formal conveyance, ſaying the premiſes were his, and if any thing happened he would ſee the vendee righted: it was determined, that the vendee might maintain an action againſt the vendor for the purchaſe money, where the rightful adminiſtrator of the tenant for years, had ouſted the plaintiff by ejectment.

(*k*) Bree v. Holbech, *Doug.* 654.

Thus,

Thus, in case of *Cripps* v. *Reade*, (*l*) which was an action of *assumpsit* for money had and received, to recover a sum of 40 guineas, which had been paid by the plaintiff to the defendant for the purchase of a leasehold estate. The defendant claimed the estate in question as administrator to *Mary Bartlett*, who had taken out letters of administration to her husband, the former possessor of the estate, under the name of *Caleb Bartlett*, his real name being *Carey Bartlett*. On the sale, the lease itself was delivered to the plaintiff, but there was no assignment or other conveyance from the defendant; but a conversation took place between them, in which the latter said, "that the premises were his right and property to do as he liked with, and if any thing happened he would see the plaintiff righted." Afterwards *John*, the nephew of *Carey Bartlett*, took out letters of administration to him by the right name, and recovered possession of the premises by ejectment.

At the trial it was contended, on the part of the defendant, 1st, That no action lay to recover the purchase money, on the authority of *Bree* v. *Holbech*,* where under circumstances of a similar nature the principle of *caveat emptor* was held to apply. But 2dly, If any action could be maintained, it could only be on the special warranty. But *Lawrence*, J., before whom the cause was tried, over-ruled the objections, and directed a verdict to be found for the plaintiff, with liberty for the defendant to move to enter a nonsuit. A motion for that purpose was accordingly made: but the Court of *King's Bench* refused the rule: And Lord *Kenyon*, Ch. J. said: "I do not wish to disturb the rule of *caveat emptor* adopted in *Bree* v. *Holbech*, and in other cases, where a regular conveyance was made, to which other covenants were not to be added; for in general the seller only covenants for his own acts, and for those of his ancestor, in which respect the case of a mortgage differs from it, as a mortgagor covenants that at all events he has a good title: but here the whole passed by parol, and it proceeded on a misapprehension by both parties that the defendant was the legal representative of the lessee, though it turned out afterwards that he was not. As therefore the money was paid under a mistake, I think that an action for money had and received will lie to recover it back. In the case cited no action at all could have been maintained."

(*l*) 6 *Term Rep.* 606. * *Ante*, 63.

So,

So, in the case of *Robinson* v. *Anderton*, (*m*) which was also an action of *assumpsit* for money had and received. The plaintiff had succeeded the defendant in a public house, and paid him for some fixtures which belonged to the house, as being scheduled in the original lease, and for which the plaintiff was afterwards obliged to pay the lessor. The defendant had been under tenant of the house, and had paid the person of whom he rented it, for these very fixtures.

On behalf of the defendant, it was contended that this action could not be maintained. The present defendant had himself paid for these fixtures, and of course thought he was entitled to sell them, and as he did not commit any fraud on the plaintiff, he could not, in this action, be compelled to refund the money.

Lord *Kenyon*, Ch. J., before whom the cause was tried, said, "This action imputes nothing criminal to the defendant; his title is disaffirmed, for it appears he has received money which he had no right to, and which he must therefore return. He may recover back the money from the person to whom he paid it, and, perhaps, tack the costs of this judgment to it."

Where an estate is sold by auction, and in the printed conditions of sale there is a statement and warranty of the title, the premises shall be taken to be sold under such title; and no verbal declarations of the auctioneer, at the time of the sale, shall be admitted to contradict the printed conditions.

Thus, in the case of *Gunnis* and others v. *Erhart*. (*n*) The plaintiffs were trustees for the sale of a copyhold estate, which was sold by auction. In the printed conditions of the sale, the premises were stated to be *free from all incumbrances*; the defendant bid for them, and they were knocked down to him; but on discovering that there was a charge on the estate of 17*l. per annum*, he refused to complete the purchase.

At the trial the counsel for the plaintiffs offered to give in evidence, that the auctioneer had publicly declared in the auction-room, when the estate was put up, that it was charged in the manner above specified. But Lord *Loughborough*, Ch. J. refused to admit such evidence, and the plaintiffs were nonsuited. And upon a motion to set aside this nonsuit, the Court of *Common Pleas* were clearly of opinion, that the evidence was not admissible, as it

(*m*) *Peake Cas. N. P.* 94. (*n*) 1 *H. Bl.* 289.

would open a door to fraud and inconvenience, if an auctioneer were permitted to make verbal declarations in the auction-room, contrary to the printed conditions of ſale; and no proof was offered that the defendant had any particular perſonal information given him of the incumbrance in queſtion.

2. *Of Money paid on the Purchaſe, &c. of Annuities.*] Where the vendor of an annuity engages that a good title ſhall be made to the vendee on a particular day, he muſt be prepared to produce his title deeds at the particular day, or the vendee is entitled to reſcind the contract, and recover back his depoſit money in an action of *indebitatus aſſumpſit* for money had and received.

Thus, in the caſe of *Berry* v. *Young*, (o) which was an [action for money had and received], and brought to recover back the depoſit money paid by the plaintiff, who was the *purchaſer of an annuity* ſold by the defendant (an auctioneer) at a public auction. One of the conditions of ſale was, that a good title ſhould be made out by the 10th of *July*. In the beginning of *July* the plaintiff called on the ſeller of the annuity, to ſhow him the title deeds: but, he not having them in poſſeſſion, gave him an abſtract of the title, which did not contain any of the deeds.

At the trial before Lord *Kenyon*, Ch. J. it was ſubmitted to his lordſhip, that application ought to have been made to the vendor at an earlier period, in order to enable him to get the deeds by the 10th of *July*. But his lordſhip ſaid, "A ſeller of an eſtate ought to be prepared to produce his title deeds at the particular day: a court of equity, indeed, will, under particular circumſtances, enlarge the time, but then thoſe circumſtances, entitling him to ſuch indulgence, muſt clearly appear; which is not the caſe in this inſtance. It is, however objected, that the plaintiff had no right to the poſſeſſion of thoſe deeds; but though he had no right to keep them, he had a right to inſpect them. A court of equity would have obliged the vendor to give atteſted copies of the deeds at his own expence, with an undertaking to produce them thereafter at the vendee's expence, for the ſupport of his title. As the ſeller therefore has here failed in completing his engagement, the plaintiff is entitled to a return of his depoſit money."

So, where the conſideration of an annuity conſiſts partly of money actually paid, and partly of a precedent debt for goods

(o) *Sittings after Mich. Term*, 1788. 2 *Eſp. Rep.* 640. *n. a.*

bonâ fide ſold to the grantor; and the annuity is ſet aſide by the court, at the inſtance of the grantor, for ſome miſtake in not complying with the formal requiſites of the annuity act, (17 *Geo.* III. c. 26.,) and not on account of any fraud in the tranſaction, the grantee may recover back the conſideration in an action of *indebitatus aſſumpſit* for money had and received, and goods ſold and delivered.

Thus, in the caſe of *Shove* v. *Webb*, (*p*) which was an action of *indebitatus aſſumpſit* for goods ſold and delivered, and money had and received. On the trial, a verdict was taken for the plaintiff, damages 160*l.* 17*s.* 3*d.*, ſubject to the opinion of the court as to the ſum of 118*l.* 17*s.* 3*d.* part thereof on the following facts:

"The defendant on the 26th of *July*, 1783, executed a bond and warrant of attorney to confeſs judgment thereon in the Court of *Common Pleas*, for ſecuring an annuity of 25*l.* during the life of the defendant. The defendant alſo executed an aſſignment of his half pay as an enſign in the army as a collateral ſecurity. The deeds for ſecuring the annuity were afterwards ſet aſide in the common pleas, becauſe part of the conſideration, for which the annuity was granted, was 46*l.* 19*s.* 9*d.* due from the defendant to the plaintiff for goods previouſly ſold by the plaintiff to him, which was not ſpecified in the memorial as regiſtered. The reſidue of the conſideration, for which the annuity was granted, was 71*l.* 17*s.* 6*d.* paid by the plaintiff to the defendant in caſh at the time of granting the annuity. The defendant was indebted to the plaintiff in 42*l.* for goods ſold."

The queſtion for the opinion of the court was, whether the plaintiff was entitled to recover any and what ſum beyond the 42*l.*

Aſhburſt, J. delivered the opinion of the court thus: "The queſtion in this caſe will depend on the conſtruction of the ſtat. 17 *Geo.* III. c. 26. called the *Annuity Act*. It appears from the above ſtate of the caſe, that the contract between the parties was for the ſale of an annuity of 25*l. per annum*, by the plaintiff to the defendant, the conſideration of which was a debt of 46*l.* 19*s.* 9*d.* antecedently contracted by the defendant, and a ſum of 71*l.* 17*s.* 6*d.* paid to him by the plaintiff in money. Upon the regiſtering of this contract under the annuity act, the conſideration was ſtated

(*p*) 1 *Term Rep.* 732.

to be the ſum of 118*l.* 17*s.* 3*d.* paid in money, whereas part of it was for goods ſold. The Court of *Common Pleas*, very properly ſet aſide and vacated the ſecurity, which they found themſelves bound to do under the expreſs words of the ſtatute. And the queſtion is, whether, as the ſecurity is ſet aſide, the party can reſort back to the original debt, the fairneſs of which is not impeached, and maintain his action for the recovery of it? On the part of the defendant it was argued, that the legiſlature meant to make it illegal to contract for the ſale of an annuity for any other conſideration than that of money, and if any part of the conſideration is for goods delivered, it ſo far taints the tranſaction, that if the ſecurity is ſet aſide, no right of action can ever ariſe as for goods ſold. In order to decide this queſtion, it will be neceſſary to conſider the proviſions and meaning of the act of parliament. It firſt provides that a memorandum of all deeds for granting life annuities ſhall, within 20 days after the execution thereof, be enrolled in the court of *chancery*, which ſhall contain the date, names of the parties, &c., otherwiſe the ſecurity ſhall be void. It then provides, that in every deed, inſtrument, or other aſſurance, by which any annuity ſhall be ſecured, "the conſideration really and "*bonâ fide* paid, which ſhall be in money only, ſhall be fully "and truly ſet forth, and deſcribed in words at length, other-"wiſe to be null and void to all intents and purpoſes." Then it provides, that "if any part of the conſideration ſhall be returned to the perſon advancing it, or if the conſideration be paid in notes, which ſhall not be paid when due, or if the conſideration, or any part of it, be paid in goods, &c., in all and every of the aforeſaid caſes it ſhall and may be lawful for the party to apply by motion, &c., and if it ſhall appear to the court that ſuch practices as aforeſaid, or any of them have been uſed, it ſhall and may be lawful for the court to order the deed, bond, &c. to be cancelled, and the judgment, if any has been entered, to be vacated." Theſe are the principal proviſions in the act of parliament on which the queſtion ariſes. Now had any part of the conſideration been for goods delivered at the time, which by agreement were to ſtand for ſo much money as the value put upon them, then the queſtion would have fairly ariſen, whether, as this was in the teeth of the act of parliament, and one of the miſchiefs the act meant to remedy, as great frauds were practiſed in palming goods upon the purchaſer of the annuity, which were not of half the eſtimated value; then I ſay the queſtion would fairly

fairly have ariſen, whether, if the ſecurities were ſet aſide, the law would have raiſed any implied promiſe to pay the value of the goods? and the maxim might have been urged *quod ex maleficio non oritur contractus.* But as that is not the caſe here, we give no opinion upon it. The goods here were not originally delivered with a view to any ſuch contract, but were really and *bonâ fide* ſold. The contract was ſtrictly legal, and not within the miſchiefs intended to be remedied by the act.

The ſecurity then is ſet aſide, not on account of any fraud or defect in the contract itſelf, but upon a formal defect in making the memorial, or at leaſt it was an innocent miſtake of the law. And taking that to be the caſe, when the ſecurity was vacated, the original contract revived. If indeed the ſale had been made a few days before, colourably, and with a view of afterwards ſtating the antecedent debt as a part of the conſideration of an annuity intended to be granted, that would have totally altered the caſe; but as it is to be taken that they were *bonâ fide* ſold, we think the plaintiff is entitled to recover for them.

In regard to the money paid as part of the conſideration; as the ſecurity is not ſet aſide for any fraud in the tranſaction, but merely for a miſtake or omiſſion in form, it becomes unconſcientious in the party to retain it, and is therefore recoverable on the count for money had and received to the plaintiff's uſe. Therefore we are of opinion, that the plaintiff is entitled to recover for his whole demand."

But in the caſe of *Straton* v. *Raſtall* and another, (*q*) it was determined, that a perſon who has only lent his name, by way of ſecuring the payment of an annuity, and has received no part of the conſideration money, is not anſwerable for the conſideration money of ſuch annuity for which he has not pledged his ſecurity, and from which he has received no benefit whatever, although he may have formally acknowledged the receipt of the money on the back of the annuity deeds.

Where the grantor of an annuity applied to have it ſet aſide on motion, and to vacate a judgment, which had been irregularly entered up on a warrant of attorney, which was given for entering up judgment on a bond in another court to ſecure the annuity,

(*q*) 2 *Term Rep.* 366.

and which warrant of attorney was improperly described in the memorial; and the court accordingly set aside the judgment; it was determined that the grantee might recover back the consideration money in *assumpsit*, and was not put to his action on a bond which was also given for securing the annuity, and which bond was not ordered to be cancelled, though voidable in pleading by virtue of the annuity act.

Thus, in the case of *Scurfield* v. *Gowland*, (r) which was an action of *assumpsit* for money had and received. At the trial it appeared that the defendant had granted to the plaintiff a certain annuity secured by a deed, a bond, and warrant of attorney to enter up judgment in the common pleas; but in the memorial of the annuity the latter instrument was stated to be a warrant of attorney to enter up judgment in the Court of *King's Bench*, and judgment having afterwards been entered up by mistake in the Court of *King's Bench*, the defendant had applied to set aside the annuity upon this error in the memorial, and to have the securities delivered up to be cancelled. And the Court of *King's Bench* did accordingly set aside the judgment, and direct that the warrant of attorney should be delivered up to be cancelled, but made no order as to the deed or bond, which remained uncancelled: nor was there proof of any offer having been made by the plaintiff to the defendant to deliver up or cancel them. This action was brought to recover back the consideration money, upon the ground of the consideration for the annuity having failed. But it was objected at the trial that the action of *assumpsit* would not lie, the plaintiff still having his remedy upon the bond and deed. And on this ground the plaintiff was nonsuited.

A motion however was afterwards made to set aside the nonsuit; and the counsel for the plaintiff contended, that the decision of the court, upon the application of the defendant, was not merely that the judgment should be vacated, but that the annuity itself should be set aside; that the defendant then had made his election to vacate the annuity; and having at least withdrawn from the plaintiff one of his securities for it, the consideration which was paid for all the securities had failed, and therefore he was entitled to recover it back. The court was of this opinion, and accordingly set aside the nonsuit, and granted a new trial. And Lord *Ellenborough*, Ch. J. said, "The argument last urged is very forcible. The plaintiff contracted for one entire assurance,

(r) 6 *East Rep.* 241.

consisting

conſiſting of ſeveral ſecurities; and he has a right to have that aſſurance entire, or to have back his money. The defendant has taken away one of his ſecurities, and therefore the conſideration for the money has failed. On this ground I think the preſent action may be ſuſtained; and to be ſure the ſubſtantial juſtice of the caſe is all on the plaintiff's ſide; though that ought never be attained by violating the forms of law; but on the latter ground I think it may be attained without any ſuch violation."

But where an annuity has become void for a defect in the memorial, the grantee cannot maintain an action for money had and received to recover back the conſideration money, unleſs the annuity has been ſet aſide by the act of the court, or the grantor has refuſed to re-execute valid ſecurities, or to pay the annuity.

Thus, in the caſe of *Weddell* v. *Lynam* and *Jones*, (*s*) which was an action of aſſumpſit for money had and received, brought to recover the ſum of 570*l.* which had been paid by the plaintiff to the defendants, as the conſideration of an annuity granted by them for the life of *Jones*. The memorial of this annuity not having been duly regiſtered, in purſuance of the ſtat. 17 Geo. 3., the annuity was void under that ſtatute, and the action was brought to recover back the conſideration money paid for it. The plaintiff proved the payment of the conſideration money.

The Counſel for the defendant made two points: 1ſt, That ſuppoſing the plaintiff to be entitled to recover, the defendant was entitled, under the iſſue in the cauſe, to an allowance of all payments made on account of the annuity, and of all expences incurred on it; and Lord *Kenyon*, Ch. J. ruled that he was ſo.

But, 2dly, he contended that this annuity having become void by the act of the plaintiff himſelf, and there being no evidence of any demand of the arrears of the annuity from the defendants, and a refuſal by them to pay them, or any application to them to re-execute the ſecurities, which they might have done, the plaintiff could not raiſe a cauſe of action by his own act, or by reaſon of his own negligence or default.

The counſel for the plaintiff anſwered, that the ſecurities having become void by act of law, the ſtatute having declared all annuities abſolutely void, the memorials of which did not comply

(*s*) 1 *Eſp. Rep.* 309.

with the ſtatute, the plaintiff was at liberty immediately to have recourſe to his action, to recover back the conſideration.

Lord *Kenyon*, Ch. J. ſaid, that it ſhould not be in the power of the grantee of an annuity, by his own act or negligence, to reſcind the contract, and avoid the ſecurity given, at his option; that as there was no evidence of any application to the defendants, either for payment of the annuity, or to re-execute the ſecurities, and as the annuity had never been ſet aſide by an act of the court, he was of opinion that the action could not be maintained. The plaintiff was accordingly nonſuited.

So, in the caſe *Richards* v. *Borrett*, (*t*) which was alſo an action of *aſſumpſit* for money had and received, it appeared in evidence that the defendant being in the *Fleet priſon*, and diſtreſſed for money, had applied (by means of one *Bryant*, an attorney,) to the plaintiff for a loan. The plaintiff lent him ſome money, and took from him a bond and warrant of attorney, to ſecure an annuity. Shortly after, the defendant applied through the ſame channel to the plaintiff to borrow more money; the plaintiff required a further ſecurity than a bond and warrant of attorney; and the defendant depoſited with him the leaſe of a farm in *Kent*, which he repreſented as unincumbered; and it was endeavoured to be proved that he meant to charge this real ptoperty with payment of an annuity for the latter ſum advanced; but the defendant's counſel aſſerted that it was only depoſited with a view to ſecure the payment of the rent by the tenant in diſcharge of the annuity. The proof not coming up exactly to that point, Lord *Kenyon*, Ch. J. ſaid, it had been held in equity that depoſiting all, or even part of the deeds reſpecting real property, implied an intention of charging the real eſtates, and gave the party a lien upon them; and that as this was an equitable action, he would hold the ſame doctrine. No memorial of the firſt annuity had been regiſtered, nor had any deed to charge the real property with the ſecond annuity been regiſtered; and the annuity having been in arrear, the preſent action was brought to recover the conſideration money.

No application had been made to the court to ſet aſide the firſt annuity; and for the defendant it was contended, that the ſecu-

(*t*) 3 *Eſp. Rep.* 102.

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rities were only voidable; and that, being ſtill in exiſtence, the preſent action could not be maintained.

Lord *Kenyon*, Ch. J., thought that the objection was well founded with reſpect to one annuity; and ſaid, "the party ſhould be called upon to complete the ſecurities; and thoſe for part having been completed, as far as the party had been called upon, they muſt be conſidered as valid, until ſet aſide by the court; but, with reſpect to the other, the defendant not having done, or being unable to do, that which he had undertaken, namely, to charge the real eſtate, the plaintiff was entitled to recover the conſideration money of that annuity."

Where an annuity has been paid for ſome time, and then reſcinded by agreement of the parties, on account of the deeds not having been properly enrolled, the purchaſer is entitled to recover back the whole of his purchaſe money.

Thus, in the caſe of *Beauchamp* v. *Borrett*, (*u*) the plaintiff having purchaſed an annuity of the defendant, which was void on account of the deeds not being enrolled, it was agreed, after two yearly payments had been made, that the annuity ſhould be reſcinded; and that the defendant ſhould pay to the plaintiff the money paid for the purchaſe of the annuity, with intereſt from the laſt yearly payment. The ſum paid for the purchaſe was 600*l.* The annuity was 100*l. per annum*; and the only queſtion in the cauſe was, whether, under this agreement, (which was contained in a letter from the defendant) the plaintiff was entitled to recover the whole 600*l.* with intereſt from the time of the laſt payment, or whether the 200*l.* which had been paid ſhould be deducted.

Lord *Kenyon*, Ch. J., was of opinion, that both under the agreement, and according to the juſtice of the caſe, the plaintiff was entitled to recover the whole 600*l.* and intereſt, from the time of the laſt yearly payment; and the jury gave damages accordingly.

But where an annuity has been ſet aſide on account of a defective regiſtry, and the grantee brings an action for money had and received, to recover back the conſideration money paid for the annuity, the grantor may ſet off the payments made in reſpect of ſuch annuity, though for more than ſix years, unleſs the plaintiff reply the ſtatute of limitations.

(*u*) *Peake's Caſe*, N. P. 109. *Et vide poſt*, 74.

Thus,

Thus, in the caſe of *Hicks* v. *Hicks*, (*v*) which was alſo an action of aſſumpſit for money had and received, to recover back 711*l.*, the conſideration money paid, many years back, for an annuity granted by the defendant to the plaintiff; but which annuity, after having been paid ſeveral years, (more than ſix) had been recently ſet aſide by the court, on the application of the defendant, for a defect in the memorial of regiſtry. The defendant pleaded a ſet-off of more money paid to the plaintiff's uſe than was due to him: and this appeared at the trial to be true, provided the defendant was at liberty to ſet off all the payments which had been made to the plaintiff in reſpect of the annuity for more than ſix years paſt; which Lord *Ellenborough*, Ch. J. held that he might, the plaintiff not having replied the ſtatute of limitations: upon which a verdict paſſed for the defendant.

The counſel for the plaintiff moved to ſet aſide the verdict, and for a new trial, on the ground that a party, who had ſet aſide an annuity on account of illegality, and had refuſed to execute a new ſecurity for the conſideration he had received, (a fact which he ſtated to have appeared at the trial) had no right to conſider thoſe which then appeared to have been his own voluntary payments to the grantee, as ſo much money paid to his uſe, for which he had promiſed to pay; and therefore he contended that the defendant had no right to ſet off any ſuch payments againſt the plaintiff's demand for the original conſideration which had failed. And he cited *Beauchamp* and *Borrett*.*

But Lord *Ellenborough*, Ch. J., ſaid, "This was either an annuity or not an annuity. If not an annuity, the ſums paid on either ſide were money had and received by the one party to the other's uſe. If the conſideration of the annuity be money had and received, it muſt be money had and received with all its conſequences; and therefore the defendant muſt be at liberty to ſet off his payments as ſuch on the ſame ſcore. In the caſe cited, Lord *Kenyon*'s opinion might have proceeded on the particular circumſtances of it; and that ſeems probable from the ſtreſs which he laid on the juſtice of the caſe. And if he meant to go beyond that, and lay down the doctrine ſtated generally, I ſhould not be inclined to accede to the authority of the opinion." The rule was accordingly refuſed.

(*v*) 3 *Eaſt. Rep.* 16. 4 *Eſp. Rep.* 196. *S. C. reported by the name of* Hills v. Hills. * *Ante*, 73.

3. *Of*

3. *Of Money Received upon other Contracts which have been Reſcinded, or not Performed,* &c.] *Indebitatus aſſumpſit* for money had and received, lies when a payment has been made on a contract which is reſcinded or put an end to; as where, by the terms of the contract, it is left in the power of one of the contracting parties to reſcind it, and he does ſo; or where both parties mutually aſſent to its being reſcinded. But if it continue open, the plaintiff cannot declare in this general form of action, but muſt ſtate the contract and breach ſpecially. (*w*)

Thus, if *A.* ſell an horſe to *B.* and agree that if he diſlikes and re-delivers the horſe to *C.* he ſhould repay the money, otherwiſe *A.* himſelf would, upon re-delivery of the horſe to *C.*, an *aſſumpſit* lies by *B.* againſt *A.* for money received to his uſe. (*x*)

So, in the caſe of *Towers* v. *Barrett*, (*y*) which was an action of *indebitatus aſſumpſit* for money had and received: and on the trial it appeared, that the ſuit was inſtituted by the plaintiff to recover ten guineas, which he had paid to the defendant for a one horſe chaiſe and harneſs, on condition to be returned in caſe the plaintiff's wife ſhould not approve of it, paying 3s. 6d. *per diem* for the hire of it. This contract was made by the defendant's ſervant, but his maſter did not object to it at the time. The plaintiff's wife not approving of the chaiſe, it was ſent back at the expiration of three days, and left on the defendant's premiſes, without any conſent on his part to receive it. The hire of 3*s.* 6*d. per diem* was tendered at the ſame time, which the defendant refuſed, as well as to return the money.

It was objected that an *indebitatus aſſumpſit* for money had and received, would not lie; but that the action ſhould have been on the ſpecial contract. The Court, however, determined that the action for money had and received was maintainable; for the condition was to return the chaiſe if not approved of; therefore the moment it was returned, the contract was at an end, and the defendant held the money againſt conſcience, and without conſideration.

Buller, J. ſaid, "It is admitted that if the defendant had actually accepted the chaiſe, the action would lie: but it has been contended that he did not receive it. Then let us ſee whether there be not ſomething equivalent to an acceptance? I think there is,

(*w*) *Vide* 1 *Term Rep.* 136.
(*x*) 3 *Lev.* 364. *Com. Dig. tit.* Action of Aſſumpſit, *A.* 1.
(*y*) 1 *Term Rep.* 133.

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from the terms of the contract. There was nothing more to be done by the defendant; for he left it in the power of the plaintiff to put an end to the contract. Here it was not in his option to refuse the chaise when it was offered to him: he was bound to receive it; and therefore it is the same as if he had accepted it.

The distinction between those cases where the contract is open, and where it is not so, is this [if the contract be rescinded, either as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or by a subsequent assent by the defendant, the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie. But if the contract be open, the plaintiffs demand is not for the whole sum, but for damages arising out of that contract. In a case before me on a warranty of a pair of horses to Dr. *Compton*, that they were five years old, when in fact they turned out to be only four, and they were not returned within a certain time, I held that if the plaintiff would rescind the contract entirely, he must do it within a reasonable time, and that as he had not rescinded the contract, he could only recover damages; and then the question was, what was the difference of the value of horses of four or five years old? so that the difference in cases of this kind is this: where the plaintiff is entitled to recover his whole money, he must show that the contract is at an end; but if it continue open, he can only recover damages, and then he must state the special contract, and the breach of it."

But in the case of *Weston* v. *Downes* (z) which was also an action for money had and received; and at the trial before Lord *Mansfield*, the plaintiff proved that the defendant, in consideration of seventy guineas, had sold him a pair of coach horses, which he undertook to take back, if the plaintiff should disapprove of them, and return them within a month; the plaintiff did return them within a month, but took another pair from the defendant in their stead, without making any new agreement. These he also returned within a month, and received a third pair on the 23d of *December*, without any fresh bargain. This third pair he disapproved of, because they were restive, and would not draw, and offered to return them on the 5th of *January*, but the fendant refused to take them back. Upon this evidence his lordship directed a nonsuit; and, on a rule to show cause why

(z) *Doug.* 23.

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the nonſuit ſhould not be ſet aſide, and a new trial granted, the queſtion was, whether the action of *aſſumpſit* for money had and received would lie in this caſe?

The Court were of opinion that the contract continued open; and the plaintiff's only remedy was by ſpecial *aſſumpſit* upon the warranty, and not *indebitatus aſſumpſit* for money had and received.

Aſhhurſt, J. ſaid, "If the plaintiff had demanded the ſeventy guineas, and brought his action on the return of the firſt pair of horſes, and no ſecond pair had been ſent, this action would have lain; but here the contract was continued, and the caſe reſembles one that was tried before me on the *Midland circuit*, and afterwards came on in this Court.*"

The caſe referred to by Mr. Juſtice *Aſhhurſt*, is *Power* v. *Wells*, (*a*) and is reported as follows: "The plaintiff gave a horſe of his own and twenty guineas for a horſe of the defendant's, which was warranted ſound, but proved to be unſound; upon which the plaintiff, after tendering a return, as mentioned in the laſt caſe, brought the action for money had and received for the twenty guineas, and alſo an action of trover for his own horſe. The Court held that neither would lie: not the latter action, becauſe the property had been changed."

So, where the ſeller of a horſe had warranted it ſound, and in a ſubſequent converſation ſaid, "that if the horſe were unſound, (which he denied) he would take it again, and return the money;" this does not amount to an abandonment of the original contract, which ſtill remains open; and though the horſe be unſound, the vendee muſt ſue upon the warranty, and cannot maintain *indebitatus aſſumpſit* for money had and received, to recover back the price, after a tender of the horſe.

Thus, in the caſe of *Payne* v. *Whale*, (*b*) which was an action of *indebitatus aſſumpſit* for money had and received, to recover back the price of a horſe which had been warranted ſound by the defendant to the plaintiff. Shortly after the original bargain was made, (of which there was no proof, except in a ſubſe-

* *The Court of King's Bench.* (*a*) *K. B. Eaſt.* 18 *Geo.* 3. *cited in Doug.* 24. *n.* 8. *and reported in Cowp.* 818. (*b*) 7 *Eaſt. Rep* 274.

quent

quent converſation) and the money paid, the plaintiff objected that the horſe was a roarer, and unſound, and tendered back the horſe, and demanded his money: the defendant admitted that he had made the warranty, but denied the unſoundneſs, and refuſed to take back the horſe or return the money; but told the plaintiff that if the horſe were unſound, he would take it again and return the money. At the trial theſe facts were proved, and that the horſe was a roarer and unſound. But it was objected, on the part of the defendant, that the action was miſconceived; for that the queſtion to be tried was the unſoundneſs, which was the ſubject of the warranty, and could not be tried in this action, the contract not being reſcinded, but only in a ſpecial action on the caſe, founded on the warranty. Lord *Ellenborough*, Ch. J., however, then thought that the ſpecial promiſe to reſcind the contract, and return the money, if the horſe were unſound, took this out of the general rule; and he therefore ſuffered the plaintiff to recover a verdict for the amount of the price paid. But upon a motion to ſet aſide this nonſuit, the Court determined that the plaintiff could not recover in this general form of action, but ought to have declared ſpecially; and Lord *Ellenborough*, Ch. J. delivered the opinion of the court as follows:

"This was a cauſe tried before me at *Guildhall*, to recover back the price of a horſe, ſold as a ſound horſe, and which proved to be unſound. It was to be collected from the evidence that there had been a warranty of ſoundneſs at the time of the original contract of ſale: but in a ſubſequent converſation, when the plaintiff objected that the horſe was unſound, the defendant ſaid, "that if the horſe were unſound, he would take it again, and return the money." And it was contended that the action for money had and received would not lie, upon the authority of *Power* v. *Wells*,* and *Weſton* v. *Downes*,† becauſe this was no other than a mode of trying the warranty, which could only be by a ſpecial action on the caſe. It had occurred to me at the trial, that the defendant, by means of his promiſe to return the money and take back the horſe if it were unſound, had placed himſelf in the ſituation of a ſtake-holder; and therefore that on proof that the horſe was unſound, he was to be conſidered as holding the money for the uſe of the plaintiff. But, upon further conſideration, I am clearly ſatisfied that that promiſe did not diſ-

* *Ante*, 77. † *Ante*, 76.

charge

charge the original warranty, and that the party complaining of the breach of that warranty muſt ſtill ſue upon it. The ſecond converſation is not to be conſidered as an abandonment of the original warranty, the performance of which the defendant ſtill inſiſted upon; but rather as a declaration that if the warranty were ſhown to be broken, he would do that which is uſually done in ſuch caſes, take back the horſe and repay the money. Then where any queſtion on the warranty remains to be diſcuſſed, it ought to be ſo, in a ſhape to give the other party notice of it, namely, in an action upon the warranty."

So, in the caſe of *Cooke* v. *Munſtone*, (*c*) which was an action of *aſſumpſit*. And the firſt count of the declaration was for not delivering 35 chaldrons of ſoil or breeze according to a ſpecial contract between the defendant and the plaintiff; to which the money counts were added.

At the trial before Sir *James Mansfield*, Ch. J. it was proved, that the defendant having agreed to ſupply the plaintiff with 35 chaldrons of ſoil at 7*s*. *per* chaldron, the plaintiff paid 2*l*. 5*s*. as earneſt; that the plaintiff afterwards ſent his barge and demanded the ſoil, offering at the ſame time to pay the remainder of the purchaſe money as ſoon as the ſoil ſhould be put on board, but that the defendant refuſed to deliver it on account of a diſpute with the plaintiff reſpecting the wharf from whence it ſhould be loaded. It appearing, however, that ſoil and breeze were very different things, it was objected for the defendant, that as the plaintiff had declared upon a contract for the delivery of ſoil or breeze, and had only proved a contract for the delivery of ſoil he muſt be nonſuited; whereupon the plaintiff inſiſted that he was entitled for a verdict for 2*l*. 5*s*, on the count for money had and received. His lordſhip thought that as the plaintiff had proceeded upon a contract which never appeared to have been reſcinded by any act or agreement between the parties, but only broken by a refuſal of one party to perform it, he was not at liberty to recover the depoſit upon the count for money had and received, and accordingly nonſuited the plaintiff, but gave him liberty to move that the nonſuit ſhould be ſet aſide, and a verdict entered for him, if the Court of *Common Pleas* ſhould be of opinion that he was entitled to it. Accordingly a rule *niſi* for that purpoſe was obtained; and Sir *James Mansfield*, Ch. J.

(*c*) 1 *New Rep. C. B.* 351.

deli-

delivered the opinion of the court as follows: "This was an action for the non delivery of ſoil or breeze, according to a contract entered into between the parties, and for which money had been paid by way of earneſt. There was alſo a count for money had and received. The framers of the ſpecial count in the declaration unfortunately ſuppoſed ſoil and breeze to be the ſame thing, but the fact proving otherwiſe, the plaintiff failed in eſtabliſhing that count. He then wanted to go into evidence on the count for money had and received, in order to recover back what had been paid by way of earneſt. If the plaintiff were allowed to go into the evidence for which he contends, the conſequences might be ſerious: he ſeeks to recover not upon the contract on which he has declared, but upon a different contract, and upon a ground which the defendant could not poſſibly be prepared to meet. In *Giles* v. *Edwards*, (*d*) the plaintiff had no other demand againſt the defendant than that for the 10*l.* 10*s.* paid to him, which conſtitutes the difference between that caſe and the preſent. The caſe of *Towers* v. *Barrett*, (*e*) has no reſemblance to the preſent: the ſpecial contract there being at an end, the money paid in reſpect of that contract was to be returned, and might therefore be recovered under the general count. Indeed, the caſes in which it has been decided that a plaintiff may, if he fail on his ſpecial contract, reſort to a general *indebitatus aſſumpſit*, are unlike the preſent in this reſpect, that in truth the ſpecial contract is put altogether out of the caſe, as not being properly complied with: but in this inſtance it would be very ſtrange to allow the plaintiff to recover on a general *indebitatus aſſumpſit*, and ſtill leave him his right of recovery for non-performance of the ſpecial contract. It is ſaid, however, that he has a right to inſiſt on the ſpecial contract, and on the general contract at the ſame time, recovering under the one his damages for non-performance, and under the other his money paid, but the caſes only warrant a permiſſion to the plaintiff to reſort to his general count when his ſpecial contract has failed altogether. I apprehend the rule to be this; where a party declares on a ſpecial contract, ſeeking to recover thereon, but fails in his right ſo to do altogether, he may recover on a general count, if the caſe be ſuch that, ſuppoſing there had been no

(*d*) *Poſt.* (*e*) *Ante*, 75.

ſpecial

ſpecial contract, he might ſtill have recovered for money paid, or for work and labour done. As in the caſe of a plaintiff ſuing a defendant, as having built a houſe for him according to agreement; there, if he fail to prove that he hath built it according to agreement, he may ſtill recover for his work and labour done. In *Buller's Niſi Prius* * the rule is thus laid down: "If a man declare "upon a ſpecial agreement, and likewiſe upon a *quantum meruit*, "and at the trial prove a ſpecial agreement, but different from what "is laid, he cannot recover on either count; not on the firſt, be- "cauſe of the variance; nor on the ſecond, becauſe there was a "ſpecial agreement: but if he prove a ſpecial agreement, and "the work done, but not purſuant to ſuch agreement, he ſhall re- "cover upon the *quantum meruit*, for otherwiſe he would not be "able to recover at all." In *Payne* v. *Bacomb*, (*f*) I ſuppoſe there was a ſpecial agreement by the defendant to pay a ſhare of the expences of the ſuit in the *Exchequer*, but that agreement had not been ſtrictly purſued by him, and conſequently he recovered for the money actually laid out by him to the defendant's uſe, on evidence of his connection with the defendant in that ſuit, and the obligation of the latter to pay. That caſe, therefore, proceeds on the ground that there was no ſpecial agreement ſtill ſubſiſting and in force between the plaintiff and defendant on which the former was entitled to recover. In this caſe, if we were to allow the plaintiff to go into the evidence which he offered, it would amount to ſaying, that there was no evidence of a ſubſiſting ſpecial agreement, when in truth there was ſuch evidence. The conſequence of ſuch a rule would be to introduce the means of practiſing great ſurprize upon defendants." The rule was therefore diſcharged.

Where a perſon has paid money upon a contract or agreement, which has not been performed, he may either affirm the agreement by bringing a ſpecial action of *aſſumpſit* thereon for general damages; or he may diſaffirm it, and recover back the money ſo paid by action of *indebitatus aſſumpſit* for money had and received.

Thus, in the caſe of *Dutch* v. *Warren*, (*g*) which was an action of *indebitatus aſſumpſit* for money had and received. The caſe was

* *Page* 139. (*f*) *Doug.* 65*. (*g*) 7 *G.* 1. *C. B. cited at large by Lord* Mansfield, *in* 2 *Bur.* 1010. *and reported in Stra.* 406. *but not ſo correctly.*

as follows:—Upon the 18th *Auguſt*, 1720, on payment of 262*l.* 10*s.* by the plaintiff to the defendant, the defendant agreed to transfer him five ſhares in the *Welch* copper mines at the opening of the books; and for ſecurity of his ſo doing gave him this note:—"18th of *Auguſt*, 1720. I do hereby acknowledge to "have received of *Phillip Dutch*, 262*l.* 10*s.* as a conſideration for "the purchaſe of five ſhares; which I do hereby promiſe to "transfer to the ſaid *Phillip Dutch* as ſoon as the books are "open; being five ſhares in the *Welch* copper mines. Witneſs "my hand, *Robert Warren.*" The books were opened on the 22d of the ſaid month of *Auguſt*, when *Dutch* requeſted *Warren* to transfer to him the ſaid five ſhares, which he refuſed to do, and told the plaintiff he might take his remedy. Whereupon the plaintiff brought this action for the conſideration money paid by him. And an objection was taken at the trial, that this action upon the caſe for money had and received to the plaintiff's uſe, would not lie, but that the action ſhould have been brought for the non-performance of the contract. This objection was over-ruled by the Chief Juſtice, who, notwithſtanding, left it to the conſideration of the jury, whether they would not make the price of the ſaid ſtock as it was upon the 22d of *Auguſt*, when it ſhould have been delivered, the meaſure of the damages, which they did, and gave the plaintiff but 175*l.* damages.

And a caſe being made for the opinion of the Court of *Common Pleas*, the action was reſolved to be well brought; and that the recovery was right, being not for the whole money paid, but for the damages in not transferring the ſtock at the time; which was a loſs to the plaintiff, and an advantage to the defendant, who was a receiver of the difference money to the plaintiff's uſe.

The court ſaid, "that the extending thoſe actions depends on the notion of fraud. If one man takes another's money to do a thing, and refuſes to do it, it is a fraud; and it is at the election of the party injured, either to affirm the agreement, by bringing an action for the non-performance of it; or to diſaffirm the agreement *ab initio*, by reaſon of the fraud, and bring an action for money had and received to his uſe."

So, in the caſe of *Holmes* v. *Hall*, (*b*) which was alſo an *indebitatus aſſumpſit* brought by an executor, for ſo much money of his teſtator, received by defendant to the uſe of the executor.

(*b*) 6 *Mod.* 161.

The

The evidence was, that ſome writings of the teſtator came to the defendant's hands, which he would not deliver up to the executor; who, to get the writings, gave him ſo much money, whereupon he promiſed to give up the writings, but afterwards refuſed. It was objected, that the plaintiff had miſtaken his action; for he ſhould have brought caſe upon the ſpecial agreement for non-delivery of the writings.

But *Holt*, Ch. J. ſaid: "If *A.* give money to *B.* to pay *C.* upon *C.*'s giving writings, &c., and *C.* will not do it, *indebitatus aſſumpſit* will lie for *A.* againſt *B.* for ſo much money received to his uſe; and many ſuch actions have been maintained for earneſts in bargains, when the bargainor would not perform, and for premiums of inſurance when the ſhip, &c. did not go the voyage: but it has been held, it would not lie for money paid upon a uſurious contract, becauſe there it was not intended it ſhould be repaid, or any thing done for it." It, however, afterwards appeared on the evidence, that the money was due to the defendant from the teſtator, and therefore the defendant would not deliver the writings without payment, and that the money was given in ſatisfaction of the debt: ſo it was clear againſt the plaintiff, and he was nonſuited.

So, in the caſe of *Hogan* v. *Shee*, (*i*) which was alſo an action for money had and received. It was brought to recover a ſum of 100*l.* which had been given to the defendant by the plaintiff as a conſideration for the defendant's procuring for his brother a place of a cadet in the ſervice of the *Eaſt India Company*, which he had undertaken to do. The defendant had given a note by which he promiſed to repay that ſum within three months in caſe he did not procure the place within the time limited. The plaintiff proved this note, and alſo ſtated that the intereſt by which the defendant had repreſented he could procure the appointment was, that of Sir *Stephen Luſhington*, or Mr. *Boſanquet*; the latter of whom was called to prove that the defendant had no manner of intereſt with him, nor were ſuch appointments to be procured for money. The plaintiff having diſcovered the deception, brought his action immediately, without waiting for the three months to be expired. The counſel for the defendant therefore

(*i*) 2 *Eſp. Rep.* 522.

contended the action could not be maintained till the expiration of that period. In answer to his objection it was stated by the counsel for the plaintiff, and assented to by Lord *Kenyon*, Ch. J., before whom the cause was tried, that where a contract is to be performed in a given time, and it is *bonâ fide*, no action can be brought until that time is expired; but where it is not *bonâ fide*, as where a party undertakes to do any thing, and on the faith of it another pays a sum of money, and it appears such person cannot perform what he has undertaken within the time specified, so that the taking of the money was fraudulent, the party may consider the agreement as a nullity, and proceed immediately to recover back the money." And his lordship accordingly ruled, that the action was maintainable before the expiration of the three months, and said, "He had so ruled it on other occasions, in the case of goods sold on credit; in which case, if it appeared that there had been any fraud on the part of the buyer, though the time of credit was not expired, he was of opinion the party might consider the credit as void, and proceed immediately for the recovery of the money."

So, where some act is to be done by each party under a special agreement, and the defendant by his neglect prevents the plaintiff carrying the contract into execution, the plaintiff may, in an action for money had and received, recover back the money he has paid under it.

Thus, in the case of *Giles* and others v. *Edwards*, (*k*) which was an action for money had and received, tried before Mr. Justice *Lawrence* at the spring assizes for *Shrewsbury*, 1797. The case was as follows: On the 6th of *June*, 1791, the defendant agreed to sell to the plaintiffs all his cordwood, growing at *Tredgodoer* in *Shropshire* at 11*s.* 6*d. per* cord ready cut; the wood was to be coaled and cleared from off the premises by *Michaelmas*, 1792, and the money was to be paid on the 1st of *March*, 1792. It also appeared that the custom was for the seller to cut off the boughs and trunks, and then cord it, and for the buyer to re-cord it, after which it became the property of the buyer; the defendant cut sixty cords, ten of which he corded, and the plaintiffs re-corded half a cord, and measured the rest. On the 8th of

(*k*) 7 *Term Rep.* 181.

March,

March, 1792, the plaintiffs paid the defendant twenty guineas: but the defendant neglecting to cord the reſt of the wood, the plaintiffs brought this action to recover back the twenty guineas as having been paid on a contract that had failed.

It was objected at the trial that this action could not be maintained, the contract being ſtill open, and that the plaintiffs ſhould have brought a ſpecial action on the caſe for non-performance of the contract. But the learned judge was of opinion, that as it was owing to the fault and negligence of the defendant that the contract, which was entire, was not carried into execution, the plaintiffs were at liberty to conſider the contract at an end, and recover back the money that they had paid, the conſideration having failed. That what had been done by the plaintiffs could not be conſidered as an execution of the contract in part, for that all that they had done was merely to meaſure the wood, and record a very ſmall part of it. The plaintiffs accordingly obtained a verdict. The defendant, however, moved the Court of *King's Bench* for a rule to ſet aſide this verdict, and to enter a nonſuit. But the court were clearly of opinion, that the directions given at the trial were right.

Lord *Kenyon*, Ch. J. ſaid: "This was an entire contract; and as by the defendant's default the plaintiff could not perform what they had undertaken to do, they had a right to put an end to the whole contract, and recover back the money that they had paid under it; they were not bound to take part of the wood only."

But in the caſe of *Dewberry* v. *Chapman*,(*l*) which was an action of *indebitatus aſſumpſit* for money had and received, and is reported as follows: "The caſe was, the defendant took the plaintiff's ſon apprentice, and received 30*l*., and was to teach him the trade of a *goldſmith*, and make him free of *London*, (the defendant himſelf being a foreigner,) ſo he was bound alſo to a freeman to that end; but by the cuſtom of *London* he cannot have his freedom without actual ſervice with ſuch freeman. It was ruled by *Holt*, Ch. J. that an *indebitatus aſſumpſit* did not lie, the defendant having cheated the plaintiff of his money, and that the plaintiff had no remedy, unleſs by ſpecial action on the caſe for not making him a freeman."

(*l*) *Comb.* 341. *Holt's Rep.* 35. *S. C.*

Of Fees Received by Counſel, &c.] No action will lie to recover back a fee given to a barriſter to argue a cauſe which he did not attend.

Thus, in the caſe of *Turner* v. *Phillips*, (*m*) was an action of *indebitatus aſſumpſit* for money had and received. The plaintiff being a party in a former cauſe, had given the defendant a brief to attend as one of his counſel on the trial of that cauſe; and the defendant not having attended the trial the preſent was brought to recover back the fee given to him on that occaſion.

Lord *Kenyon*, Ch. J. adviſed an agreement between the parties, ſaying, that whether Mr. *Phillips* would chooſe to return the fee or not, was for his own conſideration; but if the cauſe was to proceed he ſhould feel himſelf obliged to interpoſe, and the parties might apply to the court if they were diſſatisfied with his opinion. His lordſhip alluded to the caſe of *Chorley* v. *Bolcot*, (*n*) lately decided, and mentioned the general opinion of the profeſſion, that the fees of barriſters and phyſicians, were as a preſent by the client, and not a payment or hire for their labour.

Upon this the parties agreed to ſettle the cauſe out of court, but Mr. *Garrow*, who held a brief for Mr. *Phillips*, ſaid, "That he had not been guilty of the negligence imputed to him, for that it never was intended that he ſhould attend the cauſe, but the fee was given him as a compliment for the trouble he had taken in the former ſtage of it."

II. *Of Premiums Received upon Marine Inſurances.*

In caſes of inſurance, the riſk or peril inſured againſt is the conſideration for which the premium is paid. But where no riſk has been run, the conſideration for the premium fails, and an action of *indebitatus aſſumpſit* will, in general, lie to recover it back from the inſured. (*o*)

(*m*) *Peake's Cas. N. P.* 122. (*n*) 4 *Term Rep.* 317. et poſt tit. *Services and Works.* (*o*) Vide *Park on Inſurance*, 367. *Marſhall*, 548.

The

The cases on this subject may be considered under the following heads:

1. *Of the Return of Premium where no Risk has been run upon the Voyage insured; and of the Apportionment of the Premium, &c.*
2. *Of the Return of Premium upon the happening of particular Events, &c.*
3. *Of the Return Premium in Cases of Deviation from the Voyage insured.*
4. *Of Premiums paid on illegal Insurances, and of Cases where the Insurer or Insured have been guilty of Fraud, &c.*

1. *Of the Return of Premium where no Risk has been run upon the Voyage insured.*] In the case of *Martin* v. *Sitwell*, (*p*) which was an action of *indebitatus assumpsit* brought by the plaintiff for 5*l.* received by the defendant to the plaintiff's use. It appeared in evidence, that one *Barksdale* had made a policy of insurance upon account for 5*l.* premium in the plaintiff's name, and that he had paid the said premium to the defendant, and that *Barksdale* had no goods then on board, and so the policy was void.

Lord Ch. J. *Holt*, said: "As to the case in question the money is not only to be returned by the custom, but the policy is made originally void, the party for whose use it was made having no goods on board; so that by this discovery the money was received without any reason, occasion, or consideration, and consequently it was received originally to the plaintiff's use." And so judgment was given for the plaintiff.

So, in the case of *Penson* v. *Lee*, (*q*) it was held, that in an action upon a policy of insurance, with a count for money had and received, if the defendant pay no money into court, but establish, as a defence, that the risk never commenced, the plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his counsel in opening the case.

If there are two distinct points of time, or, in effect, two voyages, either in the contemplation of the parties, or by the usage of trade, and only one of the two voyages be made, the pre-

(*p*) 1 *Show.* 156. (*q*) 2 *Bos. & Pul.* 330.

both are contained in

Snow, (r) which was a
for money had and received,
premium. It was an insurance
per cent. lost or not lost, *at and*
Nova Scotia, *warranted* to depart
Portsmouth for the voyage." Before the
, the convoy was gone. Notice of this
given by the insured to the underwriters, who
make the long insurance, or return part of the
they refused, and the action was brought to recover
the premium. At the trial a case was reserved for the
the court, stating the above facts, and also stating that
round, that the usual settled premium from *London* to
Portsmouth was one and one-half *per cent.*, which the plaintiff
offered to allow the defendant to retain; and that it was usual
for the underwriters, in such like cases, to return part of the
premium; but the *quantum* was uncertain; and the *quantum*
must in its nature be so; because it depended upon uncertain cir-
cumstances. Upon this case the court were unanimously of opi-
nion, that the plaintiff was entitled to recover. Lord *Mansfield*
said: "These contracts are to be taken with great latitude:
The strict letter is not so much to be regarded, as the object and
intention of the parties. Equity implies a condition "that the
"insurer shall not receive the price of running a risk, if he runs
"none." The premium is without consideration, as to the voyage
from *Portsmouth* to *Halifax*: and then this case is within the ge-
neral principle of actions for money had and received. I do not
go upon the usage, which is only that in like cases a part of
the premium is returned without ascertaining what part. If the
risk be not run, though it be by neglect, or even the fault of
the insured, yet the insurer shall not retain the premium. It has
been objected, that the voyage being begun, and part of the risk
already run, the premium cannot be apportioned. But I can see
no force in this objection. This is not a contract so entire that
there can be no apportionment. For there are two parts in
it; and the premium may be divided into two distinct parts,
relative, as it were, to two distinct voyages. The prac-
tice shows that it has been usual, in such cases, to return a

(r) 3 *Burr.* 1237. 1 *Bl. Rep.* 318. *S. C.*

part

part of the premium, though the *quantum* be not aſcertained. And, indeed, the *quantum* muſt vary as circumſtances vary: But though the *quantum* has not been aſcertained, yet the principle is agreeable to the general ſenſe of mankind." The other judges of the court concurred in this opinion: And Mr. Juſtice *Wilmot* ſaid: "The uſage to return a part of the premium in ſuch caſes is a ſtrong proof of the equity of the thing; and nothing can be more juſt and reaſonable. If the riſk be once begun, the inſured ſhall not deviate or return back, and then ſay, "I will go no further under this contract, but will have my "premium returned." Upon this policy there are two diſtinct points of time, in effect two voyages, which were clearly in the contemplation of the parties; and only one of the two voyages was made; the other was not at all entered upon, nor was the riſk ever begun."

So, in the caſe of *Rothwell* v. *Cooke*, (*s*) where an inſurance was made on the ſhip *Manning*, "At and from *Hull* to *Bilboa*, "warranted to depart from *England* with convoy." The ſhip ſailed from *Hull* to *Portſmouth*, and from thence departed with a convoy, but this not being direct for *Bilboa*, ſhe left it, and was afterwards captured. In an action on this policy, upon the above facts coming out in evidence, the plaintiff would have been nonſuited; but his counſel inſiſted that he was entitled to a return of premium; and there being a count in the declaration for money had and received, and no money paid into court, a verdict was given for the plaintiff for the whole premium. Upon a motion to ſet aſide this verdict, and enter a nonſuit, it was contended, on the part of the defendant, that as the riſk had commenced the plaintiff could not be entitled to any return of premium. On the part of the plaintiff it was inſiſted, that there were two diſtinct voyages in this caſe, the one from *Hull* to the place of rendezvous, and the other from thence to *Bilboa*, the port of diſcharge; that the riſks were of different natures, one being without, the other with convoy. The court directed the verdict to be ſet aſide, and granted a new trial; being of opinion, that if the underwriters were not entitled to retain the whole premium, yet having run the riſk from *Hull* to *Portſmouth*, they were, at leaſt, entitled to retain a proportion of it, if, upon a further in-

(*s*) 1 *Bos. & Pul.* 172. *See alſo Marſhall*, 567. (*n. a.*)

veſtigation,

veſtigation, it ſhould turn out that the voyage was diviſible, and that the premium in ſuch caſes had ever been apportioned.

If the riſk has once commenced upon an entire contract of inſurance, the aſſured ſhall not be entitled to any apportionment, or return of premium.

Thus, in the caſe of *Tyrie* v. *Fletcher*, (*t*) it appeared, that a ſhip was inſured "At and from *London* to any port or place whatſoever "or whereſoever for twelve months, from the 19th of *Auguſt*, "1776 to the 19th *Auguſt*, 1777, warranted free from captures "and ſeizures by the *Americans*." The premium was 9*l. per cent.* The ſhip was taken by an *American* privateer, about two months after ſhe ſailed. The inſured brought an action to recover a proportion of the premium for the reſidue of the time. The court determined that the riſk was entire, and having been once begun there could be no return of any part of the premium. Lord *Mansfield* ſaid: "This caſe is ſtript of every authority. There is no caſe or practice in point; and therefore we muſt argue from the general principles applicable to all policies of inſurance. And I take it, there are two general rules eſtabliſhed, applicable to this queſtion: The firſt is, that where the riſk has not been run, whether this be owing to the fault, pleaſure or will of the inſured, or to any other cauſe, the premium ſhall be returned: becauſe a policy of inſurance is a contract of indemnity. The underwriter receives a premium for running the riſk of indemnifying the inſured, and to whatever cauſe it be owing, if he does not run the riſk, the conſideration, for which the premium was put into his hands, fails, and therefore he ought to return it. Another rule is, that if the riſk has once commenced, there ſhall be no apportionment or return of premium afterwards. For though the premium is eſtimated, and the riſk depends upon the nature and length of the voyage, yet if it has commenced, though it be only twenty-four hours, or leſs, the riſk is run; the conract is for the whole entire riſk, and no part of the conſideration ſhall be returned: and yet, it is as eaſy to apportion for the length of the voyage, as it is for the time. If a ſhip had been inſured to the *Eaſt Indies*, agreeably to the terms of the policy in this caſe, and had been taken twenty-four hours after the riſk was begun,

(*t*) *Cowp.* 666.

by

by an *American* captor, there is not a colour to ſay, that there ſhould have been a return of premium. So much then is clear; and, indeed, perfectly agreeable to the ground of determination, in the caſe of *Stevenſon* v. *Snow*. (*v*) For in that caſe the intention of the parties, the nature of the contract, and the conſequences of it, ſpoke manifeſtly two inſurances, and a diviſion between them. The firſt object of the inſurance was from *London* to *Halifax*: But if the ſhip did not depart from *Portſmouth* with the convoy ſpecified, then there was to be no contract from *Portſmouth* to *Halifax*. The parties then have ſaid, "We make a contract "from *London* to *Halifax*, but on a certain contingency it ſhall "only be a contract from *London* to *Portſmouth*." That contingency not happening, reduced, it, in fact, to a contract from *London*, to *Portſmouth* only. The whole argument turned upon that diſtinction. And all the judges, in delivering their opinion, lay the ſtreſs upon the contract compriſing two diſtinct conditions, and conſidering the voyage as being, in fact, two voyages: And this was the equitable way of conſidering it; for, though it was at firſt conſolidated by the parties, there was a defeazance afterwards, though not in words, I think Mr. Juſtice *Wilmot* put it particularly on that ground, but that was the opinion of the court. There was an uſage alſo found by the jury in that caſe, that it was cuſtomary to return a proportionable part of the premium in ſuch like caſes, but they could not ſay what part. The court rejected this as a void uſage for the uncertainty; but they argue from it, that there being ſuch a cuſtom, plainly ſhowed the general ſenſe of the merchants, as to the propriety of returning a part of the premium in ſuch caſes: And there can be no doubt of the reaſonableneſs of the thing. There has been an inſtance put of a policy, where the meaſure is by time, which ſeems to me to be very ſtrong, and appoſite to the preſent caſe; and that is an inſurance upon a man's life for twelve months. There can be no doubt but the riſk there is conſtituted by the meaſure of time, and depends entirely upon it: for the underwriter would demand double the premium for two years, that he would take to inſure the ſame life for one year only: In ſuch polices there is a general exception againſt ſuicide. If a perſon put an end to his life the next day, or a month after, or at any other period within the twelve months, there never was

(*v*) *Ante*, 88.

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an idea that part of the premium ſhould be returned. A caſe of general practiſe was put by the counſel where the words of the policy are, "At and from, provided the ſhip ſails on or before "the firſt of *Auguſt*:" and it was anſwered, in that caſe, that the whole policy would depend upon the ſhip's ſailing before the ſtated day. I do not think ſo; on the contrary, I think that cannot be. A loſs in port, *before* the day appointed for the ſhip's departure, can never be coupled with a contingency after the day. But if a queſtion were to ariſe about it, as at preſent adviſed, I ſhould incline to be of opinion, that it would fall within the reaſoning of the determination of *Stevenſon* v. *Snow*; and that there were *two* parts or contracts of inſurance, with diſtinct conditions. The firſt is, "I inſure the ſhip in port, provided ſhe "be loſt in port before the 1ſt of *Auguſt*:" and ſecondly, "If "ſhe ſhould not be loſt in port, I inſure her then during her "voyage, from the 1ſt of *Auguſt*, till ſhe reach the port ſpecified "in the policy." The loſs in port muſt happen before the riſk upon the voyage began: Let us ſee then what the agreement of the parties is in the preſent caſe. They might have inſured from two months to two months, or in any leſs or greater proportion, if they had thought proper ſo to do. But the fact is, that they have made no diviſion of time at all; but the contract entered into was one entire contract, from the 19th of *Auguſt*, 1776, to the 19th of *Auguſt*, 1777; which is the ſame as if it had been expreſsly ſaid by the inſured, "If you, the underwriter, will in-"ſure me for twelve months, I will give you an entire ſum; but I "will not have any apportionment." The ſhip ſails, and the underwriter runs the riſk for two months. No part of the premium then ſhall be returned. I cannot ſay, if there had been a recapture before the expiration of the twelve months, that the policy would not have revived."

So, in the caſe of an inſurance for a year, where a groſs ſum is given; but it is expreſſed in the policy to be *at ſo much per cent. per month*; this ſhall be deemed only a mode of computing the groſs ſum, and does not make the contract a monthly inſurance; but the inſurer is entitled to the whole premium, and there ſhall be no apportionment.

Thus, in the caſe of *Loraine* v. *Thomlinſon*, (*u*) where an inſurance was made on a ſhip againſt capture by the enemy *for* twelve

(*u*) *Doug.* 584.

months,

months, in the coaſting trade. The plaintiff underwrote 200*l.* In the body of the policy it was ſtated, "That the inſurers con-" feſſed themſelves paid the conſideration due to them by the in-" ſured, at and after the rate of 15*s. per cent. per* month:" At the bottom, oppoſite the plaintiff's ſubſcription, was written, "*Premium* received the 15th of *March*, 1779;" and on the back was indorſed, "*Newcaſtle* 15th *March*, 1779, Mr. *J. G.* "*Thomlinſon*, on his ſhip *Chollerford*, himſelf maſter, for twelve "months, in the coaſting trade, at and between *Leith* and the *Iſle* "of *Wight*, beginning the 13th of *March*, 1779, and ending the "12th of *March*, 1780." The premium was, in fact, not paid, it being the uſage in *Newcaſtle* not to pay the premiums at the time of making inſurances, but at certain times afterwards. The ſhip was loſt in a ſtorm, within the firſt two of the twelve months, for which the inſurance was made, and the inſured tendered the underwriter 3*l.* as the premium for two months. The underwriter brought his action againſt the inſured to recover the whole premium of 18*l.* The defendant pleaded the tender, and paid the 3*l.* into court. The jury found a verdict for the plaintiff for the remaining 15*l.*, ſubject to the opinion of the court, whether he was entitled to his whole premium, or only to the 3*l.* tendered. The court were clearly of opinion, that the plaintiff was entitled to recover the whole premium. Lord *Mansfield* ſaid: "This is a mere queſtion of conſtruction on the face of the inſtrument, and, therefore, parol evidence ought not to have been admitted to explain it. It is an inſurance for twelve months for one groſs ſum of 18*l.* They have calculated this ſum to be at the rate of 15*s. per* month. But what was to be paid down? Not 15*s.* for the firſt month, and ſo from month to month; but 18*l.* at once. Two caſes have been mentioned. *Stevenſon* v. *Snow* (*w*) was decided on the ground of there being *two* voyages. *Tyrie* v. *Fletcher*, (*x*) is directly in point againſt the defendant." He then repeated the two rules laid down by himſelf in this laſt caſe.

So, where a ſhip is inſured, "at and from *A.* to *B.* during "her ſtay at *B.* and from thence to her port of diſcharge at *C.*, "and at and from *C.* back to *A.*," and the ſhip is taken before ſhe

(*w*) *Ante*, 88. (*x*) *Ante*, 90.

arrives

arrives at *C.*, the insured is not entitled to any apportionment of the premium; *this* being one entire risk, and one voyage.

Thus, in the case of *Bermon* v. *Woodbridge*,(y) which was an action upon a policy of insurance on the *French* ship *Le Pactole*, and her cargo, and the voyage was described in the policy in the following words: "At and from *Honfleur* to the coast of *Angola*, during her "stay and trade there, at and from thence to her port or ports of "discharge in *St. Domingo*, and at and from *St. Domingo* back to "*Honfleur*." The clause respecting the premium was as follows: "Slaves valued at 800 livres *tournois* per head; the ship at 1450*l.* sterling; other goods, &c. as interest may appear; at a premium of 11*l. per cent.*" The ship sailed to *Angola*, and from thence, after staying some time there, to the *West Indies*. On her way to *Angola* she put into *Cayenne*, on the coast of *America*, and from *Cayenne* to *Martinico*, confessedly out of the course to *St. Domingo*. In this cause the first question was a question of fact, not material to our present enquiry, viz. whether the course taken was a deviation, or not, from the voyage insured? After all the evidence had been heard, the jury thought it was, and accordingly found a verdict for the defendant. Upon their declaring this opinion, the counsel for the plaintiff insisted, that as there was a count in the declaration for money had and received, the voyage insured ought to be considered as composed of three distinct parts, or voyages; namely, from *Honfleur* to *Angola*; 2dly, from *Angola* to *St. Domingo*; and, 3dly, from *St. Domingo* to *Honfleur*; and that, as the voyage from *St. Domingo* to *Honfleur* had never commenced, the premium ought to be apportioned, and a return made of that part which was paid to insure the risk from *St. Domingo* to *Honfleur*. Lord *Mansfield* took the opinion of the jury upon that point also; and they were clear there ought to be no return. Next day, however, his Lordship said, he had turned that question in his mind, and that he entertained some doubts upon it; and, as it was a question of law, desired the counsel to move for a new trial on that ground. A motion was accordingly made for that purpose; but, after argument, the court confirmed the opinion of the jury; and Lord Mansfield, in delivering the opinion of the court, said, "On the fullest consideration, and after looking into all the cases,

(y) *Doug.* 781.

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(though my opinion has fluctuated), we are now all clearly of opinion, that there ought not to be any return. The queſtion depends upon this: Whether the policy contains one entire riſk on one voyage, or whether it is to be ſplit into ſix different riſks; for, by ſplitting the words, and taking "at" and "from" ſeparately, it will make ſix, viz. 1ſt, at *Honfleur*; 2d, from *Honfleur* to *Angola*; 3d, at *Angola*, &c. The principles are clear. Where the riſk has has never begun, there muſt be a return of premium; and if the voyages, in this caſe, are diſtinct, the riſk from *St. Domingo* to *Honfleur* never began. On the other hand, if the riſk has once begun, you cannot ſever it, and apportion the premium. In an inſurance upon a life, with the common exceptions of ſuicide, and the hands of juſtice, if the party commit ſuicide, or is executed in twenty-four hours, there ſhall be no return. The caſe is the ſame, if a voyage inſured is once begun. Is this one entire riſk? The inſured and inſurers conſider the premium as an entire ſum for the whole, without diviſion: it is eſtimated on the whole at 11*l. per cent.*; and, which is extremely material, there is no where any contingency at any period, out or at home, mentioned in the policy, which happening or not happening, is to put an end to the inſurance. The argument muſt be, that if the ſhip had been taken between *Honfleur* and *Angola*, there muſt have been a return. By an implied warrantry, every ſhip muſt be ſea-worthy when ſhe firſt ſails on the voyage inſured, but ſhe need not continue ſo throughout the voyage; ſo that, if this is one entire voyage, if the ſhip was ſea-worthy when ſhe left *Honfleur*, the underwriters would have been liable, though ſhe had not been ſo at *Angola*, &c.; but, according to the conſtruction contended for on behalf of the plaintiff, ſhe muſt have been ſea-worthy, not only at her departure from *Honfleur*, but alſo when ſhe ſailed from *Angola*, and when ſhe ſailed from *St. Domingo*. The caſes of *Stevenſon* v. *Snow*, (z) and *Bond* v. *Nutt*, were quite different from this. They depended upon this, that there was a contingency ſpecified in the policy, upon the not happening of which the inſurance would ceaſe. In *Stevenſon* v. *Snow*, it depended on the contingency of the ſhip ſailing with convoy from *Portſmouth*, whether there ſhould be an inſurance from that place. This neceſſarily divided the riſk, and made two voyages. In *Bond* v. *Nutt*, it was

(z) *Ante*, 88.

held,

held, that there were two risks upon the same principle. "At *Jamaica*," was one; the other, viz. the risk from *Jamaica*," depended on the contingency of the ship having sailed on or before the 1st of *August*: that was a condition precedent to the insurance on the voyage from *Jamaica* to *London*. The two cases of *Tyrie* v. *Fletcher*, (*a*) and *Loraine* v. *Thomlinson*, (*b*) are very strong; for if you could apportion the premium in any case, it would be in insurances upon time. Therefore, on very full consideration, we think this one entire risk, one voyage, and that there can be no return of premium." The rule was accordingly discharged.

So, where an insurance is made on a ship, "*at and from*" her port of departure, and warranted to sail on or before a given day, and the ship does not sail within the time required by the warranty, by which the insurer is discharged; the risk at and from the port of departure is entire, and not divisible into two distinct risks; and therefore the premium cannot be apportioned so as to entitle the insurer to any return.

Thus, in the case of *Meyer* v. *Gregson*, (*c*) a ship was insured "At and from *Jamaica* to *Liverpool*, warranted to sail on or be- "fore the 1st of *August*; premium twenty guineas *per cent.* to "return eight if she sailed with convoy.—The ship did not sail till *September*, and was lost in the voyage. The warranty, as to the time of sailing, not being complied with, the underwriters were discharged from the risk after the 1st of *August*, and an action was brought by the insured for a return of premium. The defendant, who was an underwriter for 100*l.* paid eight guineas into court, being the sum to be returned if the ship sailed with convoy.—The jury apportioned the premium, and gave eight guineas more for the risk from *Jamaica* to *Liverpool*, which they considered as not having been commenced; thus allowing four guineas for the risk at *Jamaica*."—The defendant moved to set aside the verdict, and enter a nonsuit upon the ground that the risk was entire, the premium was entire, and the voyage indivisible. Lord *Mansfield*, Mr. Justice *Ashhurst*, and Mr. *Justice Buller*, (against the opinion of Mr. Justice *Willes*, who thought with the jury that the premium should be apportioned) determined that the insured was not entitled to recover more than had been paid

(*a*) *Ante*, 90. (*b*) *Ante*, 92 (*c*) *B. R. East.* 24. *Geo.* 3. *Marshall* 567.

into

into court, and therefore the rule was made abſolute. Lord *Mansfield* ſaid, "It would be endleſs to go into an enquiry about the value of the riſk, "at *Jamaica*," which is different at different ſides of the *iſland*: the parties divided the riſk as to convoy; for eight guineas were to be returned if the ſhip ſailed with convoy. Independent of that, it was an inſurance "at and from *Jamaica* to *London*," at twelve guineas *per cent.* with an abſolute warranty to ſail "on or before the 1ſt of *Auguſt*," and nothing is ſaid from whence it can be inferred that it was meant that there ſhould be two riſks, or by which the riſk at *Jamaica* could be diſtinctly eſtimated." Mr. Juſtice *Buller* ſaid, "As the parties have not conſidered it as two riſks, nor eſtimated the riſk "at *Jamaica*," neither the court or jury have any right to do it for them. In all the inſurances from *Jamaica*, the policy runs "at and from;" and though, in many inſtances, the voyage has not been commenced, yet there never was an idea of any part of the premium being returned, and no uſage to do ſo has been found by the jury."

But where there is a particular uſage, in caſes ſimilar to the laſt, to return the premium, deducting one half *per cent.* if the ſhip ſailed without convoy, or after the day preſcribed by the policy, the inſured ſhall recover the reſidue of the premium.

Thus, in the caſe of *Long* v. *Allen*, (*d*) which was an inſurance on goods, "at and from *Jamaica* to *London*, warranted to depart "with convoy for the voyage, and to ſail on or before the firſt of "*Auguſt*, at a premium of twelve guineas *per cent.*"—The ſhip ſailed from *Jamaica* to *London* on the 31ſt of *July*, but without any convoy, whereby ſhe became diſcharged from the remaining riſk. An action was brought for a return of premium. The jury found a verdict for the plaintiff, ſubject to the opinion of the court on the above facts; in addition to which they found, 'that it was the 'conſtant and invariable uſage in inſurances, at and from *Jamaica* 'to *London*, warranted to depart with convoy, or to ſail on or be-'fore a certain day, to return the premium, deducting one half '*per cent.* if the ſhip ſailed without convoy, or after the day pre-'ſcribed.'—Upon this caſe the court determined that the plaintiff was entitled to recover according to the uſage proved. Lord

(*d*) *B. R. Eaſt.* 25 *G* 3. *Marſhall* 570.

Mansfield said, "The law is clear, that if the risk be commenced, there shall be no return of premium. Hence questions arise of distinct risks, insured by one policy. My opinion has been to divide the risks. I am aware that there are great difficulties in the way of apportionments, and therefore the court has always leaned against them. But where an express usage is found by the jury, the difficulty is cured." Mr. Justice *Buller* said, "The counsel for the defendant did right to make the chief question whether any evidence of this usage ought to have been received. In mercantile cases from Lord *Holt*'s time, and in policies of insurance in particular, a great latitude of construction, as to usage, has been admitted. By usage places come within the policy which are not within the words: usage explains and even controuls the policy. The usage here found by the jury is universal; and though in some cases one half *per cent.* is a small premium for the risk *at*, yet the underwriters are aware that it is so, and no inconvenience can result from it. In *Meyer* v. *Gregson* * no usage was found."

So, in the case of *Furtado* v. *Rodgers*, (*e*) it was held, that an insurance effected in *Great Britain* on a *French* ship, previous to the commencement of hostilities between *Great Britain* and *France*, does not cover a loss by *British* capture; and that the insured was not entitled to a return of premium because the contract was legal at the time the risk commenced, and was a good insurance against all other losses but that arising from capture by the forces of *Great Britain*.

So, in the case of *Boehm* and others v. *Bell*, (*f*) it was held, that the captors of ships which have been seized as prize have an insurable interest in them; and although the Court of Admiralty should ultimately adjudge them to be no prize, and award restitution to the original owners, yet the captors are not entitled to a return of premium, as the risk was begun in the voyage home for the purpose of bringing them to adjudication in the admiralty.

2. *Of the Return of Premium upon the happening of Particular Events*, &c.]—Clauses are frequently inserted in policies of insurance, that upon the happening of a certain event, there shall be a return of part of the premium.

Thus, in the case of *Simond* and another v. *Boydell*, (*g*) which was an action for a return of premium. The material part of the po-

* *Ante* 96. (*e*) 3 *Bos. and Pul.* 191. (*f*) 8 *Term Rep.* 154. (*g*) *Doug.* 268.

licy was in theſe words: "at and from any port or ports in "*Grenada* to *London*, on any ſhip or ſhips that ſhall ſail on or "between the 1ſt *May* and the 1ſt *Auguſt*, 1778, at eighteen guineas "*per cent.* to return 8*l. per cent.* if ſails from any of the *Weſt India* "iſlands with convoy for the voyage, and arrives."—At the bottom there was a written declaration, that the policy was "on "ſugars (the muſcovado valued at 20*l. per* hogſhead) for account "of *L. Q.* being on the firſt ſugars which ſhall be ſhipped for that "account." The ſhip, the *Hankey*, ſailed with convoy, within the time limited, having on board fifty-one hogſheads of muſcovado ſugar, belonging to *L. Q.* She arrived ſafe in the *Downs*, where the convoy left her; convoy never coming farther, and indeed ſeldom beyond *Portſmouth*. After ſhe had parted with the convoy, ſhe ſtruck on a bank called the *Pan Sand*, at *Margate*, and eleven of the fifty-one caſks of ſugar were waſhed overboard, and the reſt damaged. The ſhip was afterwards got off the bank, and proceeded up the river, arrived ſafe in the port of *London*, and was reported at the cuſtom-houſe. The ſugars ſaved were taken out at *Margate*, and, after undergoing a ſort of cure by a perſon ſent from town for that purpoſe, they were carried to *London* in other veſſels; and the forty hogſheads being ſold produced 340*l.* inſtead of 800*l.* which was their valuation in the policy. The defendants paid into court the value of the ſugars loſt, and a return of 8*l. per cent.* on 340*l.* The plaintiffs inſiſted that they were entitled to have 8*l. per cent.* alſo returned on the valued price of the eleven hogſheads of ſugar which were loſt, and on the difference between what the remaining forty hogſheads produced, and their valued price. At the trial before Lord *Mansfield*, the plaintiffs had a verdict for their whole demand. Upon a motion for a new trial, the principal queſtion was upon the effect of the word "arrives." For the plaintiff it was inſiſted that this word related only to the arrival of the ſhip; that, in policies of this ſort, the intention is, that the underwriters ſhall take the war riſk upon themſelves, but that, if the veſſel be protected by convoy from that riſk, and actually arrives, they ſhall then return as much of the premium as was meant to cover it. On the other ſide, it was contended, that, as the words of the policy muſt be applied to the ſubject-matter of the inſurance, which, in this caſe, was on the goods, not on the ſhip, the return of premium could, at moſt, be only on the value of the ſugars which actually came to

London; whereas if the defendant muſt pay the valued amount of the ſugars loſt, and the difference between the valued price and the actual produce of the ſugars ſaved, and alſo return 8*l. per cent.* upon the whole, the inſured would be conſiderable gainers by the loſs. The court determined that the arrival of the ſhip was what was meant by the policy; and that the plaintiff was entitled to a return of full 8*l. per cent.* on the ſum inſured, notwithſtanding the partial loſs on the goods. Lord *Mansfield*, after obſerving how very inattentive thoſe who introduce additional clauſes into policies are to their import, ſaid, "However, I have no doubt how we muſt conſtrue this policy. Dangers of the ſea are the ſame in time of peace and of war. But war introduces hazards of another ſort, depending on a variety of circumſtances; ſome known, others not, for which an additional premium muſt be paid. Thoſe hazards are diminiſhed by the protection of convoy; and if the inſured will warrant a departure with convoy, there is a diminution of the additional premium. If the inſured will not warrant a departure with convoy, he pays the full premium; and in that caſe the underwriter ſays, "If it turn out that the ſhip departs "with convoy, I will return part of the premium." But a ſhip may ſail with convoy, and be ſeparated from it by a ſtorm or other accident in a day or two, and loſe its protection. On a warranty to ſail with convoy, *that* would not be a breach of the condition; but to guard againſt that riſk, the inſured adds, in policies of the preſent ſort, "The ſhip muſt not only ſail with "convoy, but ſhe muſt arrive, to entitle you to the return." The words "and arrives" do not mean that the ſhip ſhall arrive in the company of the convoy, but only that ſhe herſelf ſhall arrive. If ſhe does, that ſhows either that ſhe had convoy the whole way, or did not want it. But in the ſtipulation for the return of premium, no regard is had by the parties to the condition of the goods on the arrival of the ſhip. The conſtruction contended for by the defendant, is adding a comment longer than the text. If it had been meant that no return ſhould be made unleſs *all* the goods arrived ſafe, they would have ſaid, "If the ſhip arrive with all the goods, or ſafely with all the goods." The total or partial loſs of the goods was the ſubject of the indemnity, and muſt be paid for by the underwriter: but, as to the return of the additional premium, whether the goods arrive ſafe or not, makes no part of the queſtion. The ſingle principle which muſt govern

is,

is, that in the events that have happened, the war risk has been rated too high."

So, where the insurer on freight agrees to return part of the premium, "if the ship sails with convoy and *arrives*," and the ship does sail with convoy and arrive, the insured shall have the return, though the ship being captured and re-captured, the underwriters are obliged to pay salvage.

Thus, in the case of *Aquillar* and others *v. Rodgers* (*b*) where an insurance was made on the freight of the ship *Jackson*, "At "and from *Jamaica* to *London*, warranted to sail on or before the "26th of *July*, 1796, with convoy for the voyage, at the rate of "ten guineas *per cent.* to return 2*l. per cent.* if she sailed on or be-"fore the 1st of *July*, 1796, and arrived." Afterwards, by a memorandum indorsed on the policy 15th *August*, 1796, and signed by the underwriters, it was agreed, in consideration of ten guineas *per cent.* additional premium, that the warranty of sailing with convoy should be annulled, and the defendant undertook to return 10*l. per cent.* "if the ship sailed with convoy and arrived." The ship sailed from *Jamaica* on the 26th of *July* with convoy, but separated in bad weather, and was captured on the 26th of *October*, re-captured on the 5th of *November*, and carried into *Cork*, where she was delivered up to the owners, on paying 9*l.* 14*s.* 7*d. per cent.* for salvage. She afterwards arrived at the port of *London* with her cargo. In an action on the policy, with counts for a return of premium, the defendant paid into court 19*l.* 9*l.* 2*d.* the amount of the salvage on 200*l.* his subscription. The plaintiffs obtained a verdict for the premium; and, upon a motion to set it aside, the court determined that, according to the true construction of the memorandum, the insured in this case was entitled to the return of premium there stipulated. Lord *Kenyon* said, "I agree with the defendant's counsel that every arrival of the ship at her port of destination would not be an arrival within the fair construction of the memorandum; such, for instance, as an arrival in the possession of an enemy at a neutral port; or an arrival at her port in *England* as the property of other persons after a capture. But, in order to satisfy the meaning of the memorandum, it should be, an "arrival at the destined port in the course of the

(*b*) 7 *Term. Rep.* 421.

"voyage; and in this case I think the ship did arrive at the port of *London* in the course of her voyage. It is now too late to controvert the authority of *Hamilton* v. *Mendez*,* even if we were disposed so to do, which I am not, where it was holden that, though the insured may abandon on hearing of a capture, yet if they do not abandon, and the ship be afterwards re-captured, it must be considered as if she had never been out of the possession of the owners. It is eighteen years since the case of *Simond* v. *Boydell* (*i*) was decided. That case must be well known in the commercial world; and if the parties in this case had intended to make an agreement different from that which the words used in this memorandum import, they would have added after "arrived safely from the "enemy," or some words to that effect. But the words here used are not equivocal; and we ought not to depart from them. It would be attended with great inconvenience if, in construing contracts of this kind, we were not to decide according to the words used by the contracting parties. On the grammatical construction of the words, which is the safest rule to go by, I am of opinion that the verdict ought not to be set aside."

So, in the case of *Audley* v. *Duff*, (*k*) where a ship was insured at twelve guineas *per cent.* to return 6*l.* if she sailed with convoy from the coast of *Portugal* and arrived. She sailed under convoy from *Oporto* to *Lisbon*, where the whole trade bound for *England* were to rendezvous, in order to sail together from thence. The ships going from *Oporto* to *Lisbon* being dispersed in a gale of wind, the ship insured ran for *England*, and arrived. It was determined that this sailing with convoy from *Oporto* for *Lisbon* was a sailing with convoy from the coast of *Portugal*, so as to entitle the insured to 6*l. per cent.* return of premium.

In the case of *Kellner* v. *Le Mesurier*, (*l*) which was an action upon a policy of insurance upon the ship *Princess Louisa*, "at and from *Lisbon* to *Cadiz*, and at and from thence to *Flushing*, at and after the rate of twenty guineas *per cent.* to return 8*l. per cent.* if the ship sailed from *Cadiz* with convoy for *England*, and 2*l. per cent.* more for convoy from *England* to *Flushing*, or 10*l. per cent.* if with convoy for the voyage; and arrived. In the declaration it was averred that the ship was not,

* 2 *Burr.* 1198. (*i*) *Ante* 98. (*k*) 2 *Bos. and Pull.* 111.
(*l*) 4 *East Rep.* 396.

at the time of making, effecting, or ſubſcribing the policy, nor of the happening of the loſs after-mentioned, the property of or belonging to the king, or any of his ſubjects; and that the ſhip, on the 11th of *September*, 1794, ſailed from *Liſbon*, on her ſaid intended voyage, and afterwards, on the 27th of *September*, arrived at *Cadiz*, and on the ſame day ſailed and departed from *Cadiz*, with and under convoy for *England*, in proſecution of her ſaid intended voyage, and arrived; and that afterwards, and during the ſaid intended voyage, and before the ſame could be completed, to wit, on the 29th of *January*, 1795, the ſaid ſhip was taken as prize by our lord the king, and was wholly loſt to the proprietors thereof; by reaſon of which the defendant became liable to pay to the plaintiff the amount of his inſurance, and to return and repay to him 8*l.* ſo agreed by the defendant to be returned, if the ſaid ſhip ſailed from *Cadiz* with convoy for *England*, and arrived, &c. To this there was a demurrer and joinder; and upon this demurrer one of the queſtions was, whether any return of premium was demandable under the policy in the events which had happened, of a departure of the ſhip with convoy from *Cadiz* for *England*, the ſhip *not having afterwards arrived at Fluſhing*, where the voyage was to terminate? And Lord *Ellenborough*, in delivering the judgment of the court upon this point, ſaid, "Upon this point we are of opinion, that no return of premium is demandable within the meaning of the policy, no arrival at *Fluſhing*, the ultimate port of deſtination, having in this caſe taken place; that the words "and arrived," annex a condition which over-rides and governs equally all the ſeveral ſtipulations contained in the policy for a return of premium, in the events of a ſailing with convoy for the different ports and ſubdiviſions of the voyage; that is to ſay, the return of 8*l. per cent.* for ſailing from *Cadiz* with convoy for *England*, and 2*l. per cent.* more for convoy from *England* to *Fluſhing*, as well as to the return of 10*l. per cent.* the ſum total of theſe ſeveral returns, for a ſailing with convoy for the whole voyage. By inverting the order of theſe three different proviſions reſpecting returns of premium, and taking the laſt firſt, it will place the matter in a clearer point of view. The ſtipulation about premium and its return will then ſtand thus: at and after the rate of twenty guineas to return 10*l. per cent.* if the ſhip ſail with convoy for the voyage, and arrives; if from *Cadiz* with convoy for *England*, 8*l. per cent.* and 2*l. per cent.* more for convoy

from *England* to *Flushing*. In this mode of arranging the provisions respecting returns of premium, the word arrived is naturally, in point of construction, carried forward and united successively with each branch of these provisions, and operates plainly as a condition equally affecting them all. Indeed, it is impossible to assign a reason why the total amount of the two several parts of the premium thus divided and appointed, with reference to the risks of the two several parts of the voyage, should be made returnable only upon the event of arrival at the end of the voyage; and why the several parts of the premium should respectively be made returnable on account of the mere sailing with convoy for the respective parts of the voyage, independent of the same event of ultimate arrival; and this too when the underwriter should ultimately have derived no benefit from such partial convoy, but should still have a total loss to pay."

3. *Of the Return of Premium in Cases of Deviation from the Voyage insured.*]—In cases of deviation, though the insurer is discharged from his engagement, yet the risk having once commenced, there can be no return of premium.

Thus, in the case of *Hogg* v. *Horner*, (*m*) Lord *Kenyon* being of opinion that there was a deviation, it was insisted that the insured had a right to a return of premium: but his lordship thought there was an inception of the risk at, and the contract being entire, there could be no return of premium.

4. *Of Premiums Paid on Illegal Insurances; and of Cases where the Insurer & Insured have been guilty of Fraud.*]—In the case of *Lowry* and another *v. Bourdieu*, (*n*) which was an action for a return of premium: the facts proved were, that the plaintiffs had lent to *Lawson*, captain of the *Lord Holland*, *East Indiaman*, 26,000*l.* for which he had given them a common bond, in the penal sum of 52,000*l.* While he was with his ship at *China*, the plaintiffs got a policy of insurance underwritten by the defendant and others, which was in the following terms: "At and from "*China* to *London*, beginning the adventure *upon the goods* from

(*m*) *Sitt. at Guildhall after Mich. Term* 1797, *Park.* 377 *a.* 298. *n. a.*
(*n*) *Doug.* 468. *See also* Andree v. Fletcher, 3 *Term Rep.* 266.

"the

" the loading thereof on board the ſaid ſhip at *Canton*, in *China*, &c. " and upon the ſaid ſhip, from and immediately following her ar- " rival at *Canton*, valued at 26,000*l.* being the amount of Cap- " tain *Patrick Lawſon's* common bond, payable to the parties, as " ſhall be deſcribed on the back of this policy; and it bears date " the 16th *December*, 1775; and, in caſe of a loſs, no other proof " of intereſt to be required than the exhibition of the ſaid bond; " warranted free from average, and without benefit of ſalvage to " the inſurer." At the head of the ſubſcriptions was written, " On a bond as above expreſſed." Captain *Lawſon* ſailed from *China*, and arrived ſafe with his privilege (as it is called), or adventure, in *London*, on the 1ſt *July*, 1777, none of the events inſured againſt having happened. The receipt of the premium was acknowledged on the back of the policy. The inſured brought this action for a return of the premium, on the ground that the policy being without intereſt, the contract was void. The cauſe came on before Lord *Mansfield*, at *Guildhall*, when his lordſhip was of opinion that the policy was a gaming policy, prohibited by the ſtatute of 19 *Geo.* ii. c. 37. and both parties equally guilty of a breach of the law; that the rule, therefore, of *melior eſt conditio poſſidentis* was applicable to the caſe, and the plaintiffs could not recover the premium. A verdict was accordingly found for the defendant, agreeably to his lordſhip's directions; but the next morning he expreſſed a doubt as to the propriety of his opinion, becauſe the money had been paid upon an executory agreement which could never have been completed. A new trial was accordingly moved for, and fully argued; but the court diſcharged the rule: and Lord *Mansfield* ſaid, " It is certainly true, in many inſtances, that firſt thoughts are beſt. I am now very much inclined to my firſt opinion. There are two ſorts of policies of inſurance; mercantile and gaming policies. The firſt ſort are contracts of indemnity, and of indemnity only; and from that principle a great variety of deciſions and conſequences have followed. The ſecond ſort may be the ſame in form; but in them there is no contract of indemnity, becauſe there is no intereſt upon which a loſs can accrue. They are mere games of hazard, like the caſt of a die. In the preſent caſe, the nature of the inſurance is known to both parties. The plaintiffs ſay, " We mean to game, but we " give our reaſon for it: Captain *Lawſon* owes us a ſum of " money, and we want to be ſecure, in caſe he ſhould not be in a

" ſituation

"ſituation to pay us." It was a hedge. But they had no intereſt; for if the ſhip had been loſt, and the underwriters had paid, ſtill the plaintiffs would have been entitled to recover the amount of the bond from *Lawſon*. This then is a gaming policy, and againſt an act of parliament; and therefore it is clear that the court will not interfere to aſſiſt either party: according to the well-known rule, that in *pari delicto*, &c. Not that the defendant's right is better than that of the plaintiffs, but they muſt draw their remedy from pure fountains. I have returned to my old opinion; ſometimes you miſs the mark by taking too long an aim."

Mr. Juſtice *Willes*. "I ſhall make no apology for differing from the reſt of the court, in a caſe where ſuch great abilities have entertained two different opinions. The premium has been paid, and yet no riſk run; for the policy was void from the beginning, and the inſured could not have recovered from the underwriters, if the ſhip had been loſt. But I cannot think it a gaming policy. It does not appear to me, that the parties had any idea they were entering into an illegal contract. The whole was diſcloſed, and they thought there was an intereſt. This was a miſtake, but it is a new point of law. The caſe cited from precedents in *Chancery* is not, perhaps, deciſive, but it goes a great way; and it would be very hard that a party ſhould loſe that which he has paid under a mere miſtake. I think in conſcience the defendant ought to refund the premium."

Mr. Juſtice *Aſhurſt*: "I am clear that there ought not to be a new trial. A policy of inſurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice; which ſhows deciſively that this was a gaming policy."

Mr. Juſtice *Buller*: "It is very clear to me that the plaintiff ought not to recover. There was no fraud on the part of the underwriters, nor any miſtake in matter of fact. If the law was miſtaken, the rule applies, that *ignorantia juris non excuſat*. This was a mere gaming policy, without intereſt. There is a found diſtinction between contracts executed and executory, and if an action is brought with a view to reſcind a contract you muſt do it while the contract continues executory, and then it can only be done on the terms of reſtoring the other party to his original ſituation. There was a caſe of *Walker* v. *Chapman* ſome

ſome years ago in this court, where a ſum of money had been paid in order to procure a place in the cuſtoms. The place had not been procured, and the party who had paid the money having brought his action to recover it back, it was held that he ſhould recover, becauſe the contract remained executory. So, if the plaintiffs in the preſent caſe, had brought their action before the riſk was over, and the voyage finiſhed, they might have had a ground for their demand; but they waited till the riſk, (ſuch as it was, not, indeed, founded in law, but reſting on the honour of the defendant,) had been completely run. It makes no difference whether the *premium* was paid before the voyage or after it."

So, although an inſurance to protect a trading with the enemy be void; yet the inſured ſhall not recover back the premium.

Thus, in the caſe of *Vandyck* and others v. *Hewitt*, (*o*) where an inſurance was made on goods at and from *London* to *Embden* or *Amſterdam*, at a premium of ten guineas *per cent.*, to return five upon their arrival at their place of deſtination. In an action on this policy for a loſs by capture, it was averred in the declaration, that the inſurance was made for the benefit of certain perſons therein named. Upon the trial of the cauſe it appeared, that the goods were ſhipped on board a *Pruſſian* neutral veſſel, on account partly of the plaintiffs, who were naturalized foreigners reſident in *London*, and partly of certain other perſons, aliens, then reſident in *Holland*. It appearing that the inſurance was intended to cover a trading with *Holland*, that country then being at war with this kingdom, the idea of recovering the loſs was given up on the authority of the caſe of *Potts* v. *Bell*. (*p*) The plaintiffs then contended, that they were entitled to recover back the premium on the ground that the policy never attached, and conſequently the defendant's riſk never commenced. And it was compared to the caſe of *Lacauſſade* v. *White*, (*q*) in which it was determined that a perſon who has depoſited money upon an illegal wager may recover it back, even after the event is determined againſt him. But the court were clearly of opinion, that the plaintiffs had no right to recover back the premium. Lord *Kenyon*

(*o*) 1 *Eaſt Rep.* 96. (*p*) 8 *Term Rep.* 548.
(*q*) 7 *Term Rep.* 535. *But ſee* 8 *Term Rep.* 575.

ſaid:

ſaid: "There is no diſtinguiſhing this caſe, on principle, from the common caſe of a ſmuggling tranſaction. Where the vendor aſſiſts the vendee in running the goods to evade the laws of the country, he cannot recover back the goods themſelves, or the value of them. Both parties are *in pari delicto*, and *potior eſt conditio poſſidentis.*"

A foreigner cannot recover back the premium paid by him upon a policy of inſurance, if the voyage be in contravention of the laws of this country.

Thus, in the caſe of *Morck* and another v. *Abel*, (*r*) where a policy of inſurance was effected upon a *Daniſh* ſhip at and from *Bengal* (in which there are *Daniſh* ſettlements,) to *Copenhagen*, and the ſhip loaded at *Calcutta*, contrary to the 12 *Car.* 2. c. 18. ſ. 1. the court held, that the aſſured was not entitled to recover back the premium, even though it appeared that the practice of loading foreign ſhips at *Calcutta* had prevailed for a length of time, and had been authorized by act of parliament * ſoon after the ſhipment in queſtion.

If the underwriter has been guilty of any fraud, an action lies againſt him at the ſuit of the inſured to recover back the premium.

Thus, in the caſe of *Carter* v. *Boehm*, (*s*) where it was ſaid by Lord *Mansfield*, "That a policy would be void againſt the underwriter, if he concealed any thing material to the inſurance; as if he inſured a ſhip on her voyage which he privately knew to be arrived: and that an action would lie to recover the premium."

In the caſe of *Chapman* and others, aſſignees of *Kennet* v. *Fraſer*, (*t*) it was determined, that in all caſes of *actual* fraud on the part of the aſſured, or his agent, the underwriter might retain the premium.

(*r*) 3 *Bos. & Pul.* 35. Lubbock v. Potts, 7 *Eaſt Rep.* 456, *S.P.* * 37 Geo. III. *c.* 117. (*s*) 3 *Bur.* 1909. (*t*) *B. R. Trin.* 35 Geo. III. *Park.* 218. *See alſo* Tyler v. Horn, *Sittings after Hill.* 1785. *ib. But ſee the caſes of* Whittingham v. Thornburgh, *Prec. in Ch.* 20. 2 *Vern.* 206. Da Coſta v. Seandret, 2 *P. W.* 170. Wilſon v. Ducketi, 3 *Burr.* 1361.

12. *Of Money Received upon illegal Contracts and Agreements, &c.*

When money has been paid upon an illegal contract it is a general rule, that if the contract be *executed*, and both parties are *in pari delicto*, neither of them can recover from the other the money ſo paid; but if the contract continues *executory*, and the party paying the money be deſirous of reſcinding it, he may do ſo, and recover back his depoſit by action of *indebitatus aſſumpſit* for money had and received. (v) And this diſtinction is taken in the books, namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly ſuch an action can in no caſe be maintained: but where the action proceeds in diſaffirmance of ſuch a contract, and, inſtead of endeavouring to enforce it, preſumes it to be void, and ſeeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is conſonant to the ſpirit and policy of the law that the plaintiff ſhould recover. (w)

There are, however, ſome caſes, notwithſtanding the contract is *executed*, in which the party who has paid money under it, has been allowed to recover it back again: for though in all illegal contracts there is a degree of delinquency in both the contracting parties, yet it is deemed expedient upon principles of public policy, in order to prevent the repetition of crimes, or the evaſion of a public act of parliament, to allow the party paying the money to recover it back by action of *indebitatus aſſumpſit* for money had and received.

The caſes on this ſubject are various, I ſhall therefore conſider them under the following heads:

1. *Of Money Received on Illegal Contracts in general...*
2. *Of Money Paid for uſurious Intereſt, either on a Loan of Money, or a Pledge of Goods.*

(v) *Doug.* 470. *Cowp.* 199, 200. 792. (w) Vide 1 *H. Bl.* 67.

3. *Of*

3. *Of Money paid to a Creditor as a Conſideration for his ſigning a Bankrupt's Certificate, &c.*

4. *Of Money Received on Illegal Wagers, &c.*

5. *Of Money Depoſited with a Stake-holder upon an Illegal Contract or Wager.*

6. *Of Money Paid on Illegal Inſurances in the Lottery, &c.*

1. *Of Money Received upon Illegal Contracts in general.*] If a man gives his agent money to expend upon an illegal tranſaction, and it is expended accordingly, no action lies to recover it back. Thus, (*w*) where money was given by way of a bribe, *Holt*, Ch. J. ſaid: "That though he who received it ought to be puniſhed, yet he who gives the bribe ought not to be encouraged by any way to recover it back again."

So, in the caſe of *Munt* and another, executors, &c. v. *Stokes*, and another, (*x*) which was an action of *indebitatus aſſumpſit* to recover 2004*l.* 3*s.* 4*d.* for money had and received by the defendants for the uſe of the plaintiffs, as executors of *A. M'Intoſh*. At the trial a ſpecial caſe was reſerved for the opinion of the Court of *King's Bench* upon the following facts: "In *January*, 1785, the plaintiff's teſtator, *Alexander M'Intoſh*, was at *Calcutta* in *Bengal*, in the *Eaſt Indies*, with the ſhip *Huſſar*, carrying *Daniſh* colours, whereof he was at that time maſter and owner. By the laws of *Denmark*, all perſons who are maſters of ſhips belonging to *Daniſh* ports, and carrying the *Daniſh* flag, muſt be either natural born ſubjects of the kingdom of *Denmark*, or become denizens of *Denmark*, and take the oaths of allegiance to the King of *Denmark*. On the 6th of *January*, 1785, *M'Intoſh* borrowed, at *Calcutta*, of the defendants (being *Britiſh* ſubjects,) 20,000 current rupees upon the terms mentioned in the condition of a reſpondentia bond, (which was ſtated). The condition (after reciting that *M'Intoſh* had taken up and received of the defendants 20,000 current rupees, making 2166*l.* 13*s.* 4*d.* to run at reſpondentia on the ſhip *Huſſar*, of which *M'Intoſh* was the commander, and her guns, arms, ammunition, ſtores, &c. and alſo upon the goods and merchandizes laden, and to be laden on board during her voyage bound from *Calcutta* from out of the

(*w*) Vide *Skin.* 412. 1 *Salk.* 22. *Cowp.* 792. *But ſee* 1 *Ld. Raym.* 89. *See alſo Doug.* 697. *in notis.* (*x*) 4 *Term Rep.* 561.

river

river *Hoogly* to the coaſt of *Coromandel*, and thence to proceed for and arrive at *Copenhagen* in *Denmark*, being to ſail on the 31ſt of *January* from out of the river *Hoogly*, at the rate of 10*l. per cent.* for the voyage,) was, that if the *Huſſar* did ſail on the above voyage, and arrive at *Copenhagen* before the end of nine months, to be computed from the day of leaving *Calcutta*, when alſo the riſk of the reſpondentia lender commenced; and if *M'Intoſh*, his heirs, executors, &c. before the end of nine months, &c. paid to the defendants, &c. the principle ſum of 2166*l.* 13*s.* 4*d.* in *London* together with the premium of 10*l. per cent.* for the voyage, if the ſame were performed within nine months, &c., and if any longer, *pro ratâ*: in conſideration of which premium, the uſual riſk of rivers, violence of the ſeas, &c. was to be on account of the defendants; and in caſe of the loſs of the ſhip, *M'Intoſh*, his heirs, executors, &c. did within ſix months next after ſuch loſs, or as ſoon after ſuch average ſhould be aſcertained, pay to the defendants ſuch average or proportion, as by cuſtom ſhould become due on the ſalvage, then the obligation was to be void. *A. M'Intoſh* ſoon afterwards ſailed in the ſhip *Huſſar*, with *Daniſh* colours, from *Calcutta* to the coaſt of *Coromandel*, and there took goods on board; and from thence ſailed for *Copenhagen*. In *December*, 1785, *A. M'Intoſh* died, having firſt made his will, and appointed the plaintiffs, and four others executors. The plaintiffs alone proved the will in the prerogative court of *Canterbury*. On the 12th *October*, 1786, the plaintiffs, upon application to them by the defendants, paid to the defendants 2004*l.* 3*s.* 4*d.* in diſcharge of the bond ſo entered into by *M'Intoſh*.

The court decided, that the executors could not maintain the action to recover back this money, notwithſtanding the defendants could not have compelled them to pay it. And Lord *Kenyon*, Ch. J. ſaid: "It has been argued that this was not a debt which the plaintiffs were bound in conſcience to pay to the defendants: but I think that they were bound both in honour and conſcience to refund the money which the defendants had advanced, though the original contract were contrary to a poſitive law; for this is not a penalty, but money which the defendants had actually advanced. And the original contract was not *malum in ſe* but *malum prohibitum*. Though the ſecurity on which this money was borrowed, was void by the ſtatute, I do not know but that

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an action for money had and received might have been maintained by the defendants to recover back this money: the cases cited, relative to premiums, go a great way to shew that. But the ground on which I go is this, that there was no misrepresentation, or any improper conduct by the defendant to extort the money from the plaintiffs; but the plaintiffs, knowing the whole transaction, and the law also, as they were bound to know, voluntarily paid it. There was nothing contrary to conscience in the defendants receiving the money which they had advanced; the plaintiffs therefore are not entitled either in law or in equity to recover it back again.

So, in the case of *Pickard* v. *Bonner*, (y) which was also an action of *indebitatus assumpsit* for money had and received; the facts were as follow: Mr. *Bonner*, the defendant, having a considerable place in the post-office, and having occasion to employ several persons as clerks to him; the plaintiff applied to one *Morris*, who was chief clerk in the defendant's office, to procure him such a situation, and agreed to give 100*l.* as a consideration for procuring the place. It was agreed that the plaintiff should go into the defendant's office, and continue there six months on trial; that he should have at the rate of 80*l.* *per annum* for that time, and afterwards a further salary, if the service continued. Afterwards the contract broke off, and it being discovered that *Morris* had paid this money over to the defendant, this action was brought to recover it back. *Morris* was called as a witness, and he swore that he did not receive this money on account of the defendant, but entirely on his own account, and that he paid it to the defendant in part of a debt due from him to the defendant, of course this action could not be supported.

But Lord *Kenyon*, Ch. J. said: "That had it been proved that this was a transaction between the plaintiff and the defendant, the money could not, according to the doctrine which had been laid down by Lord *Mansfield*, be recovered back, for it being for the purchase of a place under government would be illegal, and therefore the parties being in *pari delicto*, the plaintiff could not succeed in a court of justice. Lord *Holt* had been of opinion that such an action might be maintained, and his

(y) *Peak's Cas. N. P.* 221.

lordship

lordſhip ſaid, he was inclined to agree with that opinion, though he certainly ſpoke with great diffidence when giving an opinion contrary to that of Lord *Mansfield*, but he thought it would be much more for the benefit of the public, if a perſon who had paid his money under ſuch a contract were permitted to recover it back.

But in the caſe of *Walker* v. *Chapman*, (z) where a ſum of money had been paid, in order to procure a place in the cuſtoms; but the place had not been procured; and the party who paid the money having brought his action to recover it back, it was held, that he ſhould recover becauſe the contract continued *executory*.

Where a perſon receives money to the uſe of another on an illegal contract, he is not allowed to retain it, but muſt pay it over to the perſon for whoſe uſe he received it. (a)

2. *Of Money Paid for Uſurious Intereſt, either on a loan of Money or a Pledge of Goods.*] By the ſtat. 12 *Ann*, ſtat. 2. c. 16. the taking of more than 5*l. per cent.* is declared illegal, and the contract void; the borrower therefore, if he pays more than legal intereſt, may recover back the exceſs: (b) for this ſtatute, it is ſaid, (c) was made to protect needy and neceſſitous perſons from the oppreſſion of uſurers and monied men, who are eager to take advantage of the diſtreſs of others; whilſt they, on the other hand, from the preſſure of their diſtreſs, are ready to come into any terms, and with their eyes open not only break the law, but complete their own ruin. The borrower, however, cannot avoid the contract and recover the principal and legal intereſt, but only the exceſs of intereſt; although the lender is liable upon the ſtatute, if convicted, to the penalty of treble the ſum lent, which can only be recovered by action of *debt*. (d)

It is, indeed, reported in the caſe of *Tomkins* v. *Bernett*, (e) that where three were bound in an uſurious obligation, one of

(z) *Leſt.* 342. *and cited by Ld.* Mansfield, *in Doug.* 471.
(a) Vide Tenant v. Elliot, 1 *Bos. & Pul.* 3. Farmer v. Ruſſell, *ib.* 296.
(b) Boſanquet v. Daſhwood, *Cas. Temp. Talbot*, 38. *See alſo* Fitzroy v. Gwillim, 1 *Term Rep.* 153.
(c) Per *Ld.* Mansfield, *Cowp.* 792. (d) *Doug.* 697. *in notis.*
(e) 1 *Salk.* 22.

them paid ſome part of the money, and afterwards the obligee brought debt againſt another of the obligors, who pleaded the ſtatute of uſury, and avoided the bond: and now the obligor that had paid ſome part of the money without cauſe to the obligee, brought an *indebitatus aſſumpſit* againſt him to recover back that money; *Treby*, Ch. J. allowed that where a man pays money on a miſtake in an account, or where one pays money under or by a mere deceit, it is reaſonable he ſhould have his money again; but where one knowingly pays money upon an illegal conſideration, the party that receives it ought to be puniſhed for his offence; and the party who pays it is *particeps criminis*, and there is no reaſon that he ſhould have his money again; for he parted with it freely, and *volenti non fit injuria.*

But in *Smith* v. *Bromley*, (*f*) Lord *Mansfield* makes the following obſervation upon the caſe of *Tomkins* v. *Bernett*, "This caſe has been often mentioned, and I have often had occaſion to look into it; but it is ſo looſely reported, and ſtuffed with ſuch ſtrange arguments, that it is difficult to make any thing of it. One book * ſays it was determined by Lord *Holt*; another † by Lord *Treby*. Certain it is, it was only a *niſi prius* caſe. I think the judgment may have been right, but the reporter, (*Salkeld*,) not properly acquainted with the facts, has recourſe to falſe reaſons in ſupport of it The caſe muſt have been, as I take it, an action to recover back what had been paid in part of principal and legal intereſt, upon an uſurious contract; and therefore the action would not lie; for ſo far as principal and legal intereſt went, the debtor was obliged, in natural juſtice to pay, therefore he could not recover it back. But for all above legal intereſt, equity will aſſiſt the debtor to retain, if not paid, or an action will lie to recover back the *ſurplus*, if the whole has been paid. The reporter, not ſeeing this diſtinction, has given the abſurd reaſon, that *volenti non fit injuria*; and, therefore, the man, who from mere neceſſity, pays more than the other can, in juſtice, demand, and who is called, in ſome books, the ſlave of the lender, ſhall be ſaid to pay it willingly, and have no right to recover it back; and the lender ſhall retain; though it is in order to prevent this oppreſſion and advantage taken of the neceſſity of others, that the law has made it penal for him to take.

(*f*) *Doug.* 697. *in notis.* *See alſo Cowp.* 200.
* *Skin.* 411. † 1 *Salk.* 22.

So,

So, when exorbitant and illegal intereſt is received upon a pledge, *indebitatus aſſumpſit* lies to recover it back.

Thus, in the caſe of *Aſtley* v. *Reynolds*, (*g*) which was an action for money had and received to the plaintiff's uſe; and the caſe reſerved for the conſideration of the court was, that the plaintiff had pawned plate for three years with the defendant for 20*l.*; at the end of three years the plaintiff came to redeem it; the defendant then inſiſted to have 10*l.* for intereſt; which the plaintiff refuſed, but he tendered 4*l.*, knowing 4*l.* to be more than legal intereſt; this, however, the defendant declined to accept, and they parted: at ſome months diſtance the plaintiff came and made a ſecond tender of the 4*l.*; but the defendant ſtill inſiſting upon 10*l.*, the plaintiff paid it, and had his goods: and afterwards brought this action for the ſurplus beyond legal intereſt.

It was argued by the counſel for the defendant, that there was no colour to ſay the plaintiff paid the money, either by miſtake or force, it being ſtated, that he knew the 4*l.*, which he had tendered, was beyond the legal intereſt; and he did it with his eyes open, having another remedy for his goods by *trover*, after tender of the legal intereſt; therefore it fell within the rule *volenti non fit injuria*.

But the court ſaid: "The caſes of payments by *miſtake* or *deceit*, are not to be diſputed; but this caſe is neither; for the plaintiff knew what he did; in that lies the ſtrength of the objection: but we do not think the tender of the 4*l.* will hurt him, for a man may tender too much, though a tender of too little is bad; and where a man does not know exactly what is due, he muſt, at his peril, take care to tender enough. We think alſo that this is a payment by compulſion; the plaintiff might have ſuch an immediate want of his goods, that an action of *trover* will not do his buſineſs. Where the rule *volenti non fit injuria* is applied, it muſt be where the party had his freedom of exerciſing his will, which this man had not: we muſt take it he paid the money relying on his legal remedy to get it back again".

As the plaintiff, in this form of action, muſt make out an equitable title to recover, ſo the defendant may repel it by circumſtances which will, in equity, conſtitute a defence.

(*g*) *Stra.* 915. *See alſo* Fitzroy v. Gwillim, 1 *Term Rep.* 153.

Thus, in the caſe of *Jeſtons v. Brooke*, (*b*) which was an action for *money had and received*; And upon a rule to ſhow cauſe why the verdict obtained for the plaintiff ſhould not be ſet aſide, and a nonſuit entered, Lord *Mansfield* reported as follows: "The plaintiff and defendant were both brokers: the defendant wanted to purchaſe a parcel of goods, which had been diſtrained for rent, but had no money. He applied therefore to the plaintiff; who on the 12th of *November*, 1777, lent him 45*l.* upon his note of hand, payable on demand. At the ſame time it was agreed that the plaintiff ſhould have half of the net profits, which ſhould be made of the goods, upon the reſale of them, over and above the note of hand. Two hours after the ſale, payment of the note of hand was demanded by the plaintiff, in order to force the defendant to ſell the whole of the goods to him; and, as an inducement, the plaintiff offered him 3*l.* profit, which the defendant refuſed; and ſold the goods afterwards for 5*l.* profit. The plaintiff paid the 45*l.* to the landlord, by the direction of the defendant, and put a man into poſſeſſion on the night of the ſale. The note was repaid on the 21ſt of the ſame month. This action was brought for 2*l.* 10*s.* the half of the net profits for which the goods were reſold. Towards the end of the cauſe it ſtruck me, that this contract was uſurious on the part of the plaintiff; becauſe he was to have half of the profits, and was to run no riſk. The jury found a verdict for the plaintiff, ſubject to the opinion of the court, upon the queſtion, whether this contract was uſurious or not?

The court were of opinion, that the demand of the ſurplus was an exorbitant demand, and therefore ought not to be recovered. And Lord *Mansfield* ſaid: "This is an action for money had and received; and therefore it is analogous to a bill in equity. The ground of the action is to recover half the net profits ariſing by the reſale of certain goods purchaſed by the defendants, as ſtated in the report. The general queſtion is, whether the plaintiff ought to recover in an action for money had and received? that is, whether it is againſt conſcience that the defendant ſhould retain the whole profits of the goods in queſtion to himſelf? There are two grounds, either of which is an anſwer to the action. 1ſt, If the contract be uſurious within the ſta-

(*b*) *Cowp.* 793.

tute;

tute: or, 2d, Though not uſury within the ſtatute, if it be an unconſcionable bargain.

"Now to conſider this caſe in the light of an uſurious contract. There is no contrivance whatever by which a man can cover uſury. Here are two brokers. One, who is the defendant, wants to buy goods that were upon ſale; and the other agrees to lend him money for that purpoſe; but he is to lend it upon the terms of being paid both principal and intereſt from the time the loan commenced. It is true, no rate of intereſt is reſerved in the note: but is made payable on demand: from the moment of demand therefore, it would carry intereſt; and the plaintiff had it in his power to make demand, the very inſtant the bill was delivered. Beſides this, he does not even truſt the defendant with the poſſeſſion of the money in his own hands. But when the goods are bought, and not before, he pays the money to the landlord for the defendant. Within two hours after he demands the money, and then the note begins to carry intereſt. He was not bound by the agreement to give credit for a moment. So that there was no ſort of riſk whatſoever; and in fact, as ſoon as the money was paid, a man was put into poſſeſſion for himſelf, as well as for the defendant, the note therefore was payable, with intereſt from the time of demanding payment, and he has poſſeſſion of the goods: that was manifeſtly with a view to ſecure to himſelf the ſurplus advantage which he had ſtipulated for upon a reſale. Both parties, from their ſituation, knew there would neceſſarily be a profit. It ſeems to me therefore, that the intention of the contract was to get more than principal and legal intereſt upon the note, which is uſury within the meaning of the ſtatute. But ſuppoſe it were not ſtrictly uſurious, ſhall a man in an action for money had and received, which is an equitable action, and founded in conſcience, recover an unmeaſurable and exorbitant demand as this? Moſt clearly he ſhall not. Therefore upon either ground, the verdict muſt be ſet aſide, and the nonſuit entered."

3. *Of Money Paid to a Creditor as a Conſideration for his ſigning a Bankrupt's Certificate, &c.*] By the ſtat. 5 *Geo.* 2. c. 30. ſ. 11, "Every contract or agreement made with, or ſecurity given "from the bankrupt himſelf, or any perſon on his behalf, as the "conſideration for ſigning his certificate, is abſolutely void." And it has been determined, that where money is paid to a creditor,

ditor, as a conſideration for ſigning the certificate of a bankrupt, it may be recovered back by action of *indebitatus aſſumpſit*: for where contracts or tranſactions are made void by poſitive ſtatutes, for the ſake of protecting one ſet of men from another; the one, from their ſituation and condition, being liable to be oppreſſed or impoſed upon by the other; there the parties are not conſidered *in pari delicto*.

Thus, in the caſe of *Smith* v. *Bromley*, (*i*) which was an action for money had and received to the plaintiff's uſe under the following circumſtances: The plaintiff's brother having committed an act of bankruptcy, the defendant, being his chief creditor, took out a commiſſion againſt him, but afterwards finding no dividend likely to be made, refuſed to ſign his certificate. But on frequent application and earneſt intreaties made by the bankrupt to one *Oliver*, a tradeſman in *town*, and an intimate friend of the defendant, who lived in *Cheſhire*, he got *Oliver* to write to the defendant ſeveral times; and he at laſt prevailed on the defendant to ſend him, (*Oliver*,) a letter of attorney, empowering him to ſign the certificate, which *Oliver* would not do, unleſs the bankrupt, or ſomebody for him, would advance 40*l*., and give a note for 20*l*. more, and which, on *Oliver*'s ſigning the certificate for the defendant, the plaintiff, (who was the bankrupt's ſiſter,) paid, and gave to *Oliver* accordingly, who thereupon gave her a receipt for the money, promiſing to return it if the certificate was not allowed by the *Chancellor*. The certificate was allowed. The plaintiff afterwards brought her action againſt *Oliver* to recover back the 40*l*. but that action coming on to be tried before Lord *Manſfield*, at *Guildhall*, at the ſittings after laſt *Trinity Term*, 1759, and it then appearing that *Oliver* had actually paid over or accounted for the 40*l*. to *Bromley*, and his lordſhip being clearly of opinion, that ſuch action would not lie againſt the plaintiff's own agent, who had actually applied the money to the purpoſe for which it was paid to him, the plaintiff was nonſuited; and therefore brought the preſent action againſt *Bromley* himſelf, which coming on to be tried, it was proved that the money was received by *Oliver*, and paid over to the defendant.

(*i*) *Sittings at Guildhall after Eaſt.* 1760. *coram Ld.* Manſfield *reported in Dougl.* 696, *n.* 3. *See alſo* Jones v. Barkley, *ib.* 695. *n.* 3. Stock v. Mawſon, 1 *Bac. & Pul.* 286. *S. P.* et vide *ante* 1 *Vol. tit.* Bankrupts and their Affairs.

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It was contended for the plaintiff, that this money was paid, either without conſideration, or upon one that was illegal, and, in either caſe, was recoverable back by this action.

For the defendant it was argued, that there was certainly a conſideration for the payment of the money, to wit, the ſigning of the bankrupt's certificate; that if this conſideration was illegal, the plaintiff was *particeps criminis*; and had paid it voluntarily, knowingly, and without any deceit.

But Lord *Mansfield* was of a different opinion, and ſaid: "It was iniquitous and illegal in the defendant to take, and therefore it was ſo to detain, this 40*l*. If a man makes uſe of what is in his own power to extort money from one in diſtreſs, it is certainly illegal and oppreſſive, and whether it was the bankrupt or his ſiſter that paid the money it is the ſame thing. The taking money for ſigning of certificates is either an oppreſſion on the bankrupt or his family, or a fraud on his other creditors. It was a thing wrong in itſelf before any proviſion was made againſt it by the ſtatute; for if the bankrupt has conformed to all that the laws require of him, and has fairly given up his all, the creditor ought, in juſtice, to ſign his certificate; but, on the other hand, if the bankrupt has been guilty of any fraud or concealment, the creditor ought not to ſign for any conſideration whatever. If any near relation is induced to pay the money for the bankrupt, it is taking an unfair advantage, and torturing the compaſſion of his family: if it is the money of the bankrupt himſelf it is giving one creditor his debt to the excluſion of the others, and a fraud upon them. As to the caſe cited from *Peere Williams*, 620, that only affected the perſon who petitioned. There might have been ſufficient of the creditors in number and value to ſign without him, and he had a right to compromiſe it upon what terms he pleaſed. The petitioning, or not, was intirely in his own power, and not like the preſent caſe. It is argued, that as the plaintiff founds her claim on an illegal act, ſhe ſhall not have relief in a court of juſtice. But ſhe did not apply to the defendant or his agent to ſign the certificate on an improper or illegal conſideration, but as the defendant inſiſted upon it, ſhe in compaſſion to her brother paid what he required. If the act is in itſelf immoral, or a violation of the general laws of public policy, there the party paying ſhall not have this action; for where both parties are equally criminal againſt ſuch general laws, the rule is, *potior eſt conditio defendentis*. But there

are other laws which are calculated for the protection of the ſubject againſt oppreſſion, extortion, deceit, &c. If ſuch laws are violated, and the defendant takes advantage of the plaintiff's condition or ſituation, there the plaintiff ſhall recover: and it is aſtoniſhing that the reports do not diſtinguiſh between the violation of one ſort and the other." The jury, under his lordſhip's direction, found a verdict for the plaintiff, 40*l.* damages.

4. *Of Money Received on Illegal Wagers*, &c.]—If a wager be made on a boxing match, and, on the event happening, the winner receives the money, it cannot be recovered back by the loſer: for where one knowingly pays money upon a conſideration executed, which is in itſelf immoral and illegal, and where the parties are equally criminal, the rule is, *in pari delicto, potior eſt conditio defendentis*, not becauſe the defendant is more favoured, or entitled in conſcience to retain the money, but becauſe the plaintiff cannot make out a conſcientious claim to recover it back. (*k*)

But where money is paid upon an illegal wager, and the perſon paying it wiſhes, before the event happens which is to decide the wager, to put an end to the wager altogether, he may do ſo, and recover back the money ſo paid by action of *indebitatus aſſumpſit*.

Thus, in the caſe of *Tappenden* and others, aſſignees of *Bray*, v. *Randall*, (*l*) which was an action of *indebitatus aſſumpſit* for money had and received; at the trial a verdict was found for the plaintiffs, damages 216*l.* ſubject to the opinion of the Court of *Common Pleas*, on the following caſe: "*Bray* duly became bankrupt, and a commiſſion was iſſued againſt him, under which the plaintiffs were declared his aſſignees. On the 12th *November*, 1800, previous to any act of bankruptcy, in conſideration of 210*l.* then paid by *Bray* to the defendant, the defendant entered into a bond, in the penal ſum of 999*l.* with a condition as follows: "Whereas the ſaid *William Randall* hath, in conſideration "of 205*l.* to him paid by the ſaid *John Bray*, at the time of the "ſealing and delivery of the abovewritten bond or obligation, "contracted and agreed to pay unto the ſaid *John Bray*, or his "aſſigns, on the firſt day of *May* in every year, one annuity or "clear yearly ſum of 105*l.* until he the ſaid *William Randall*,

(*k*) *Vide Bul. N. P.* 132. *Cowp.* 792. (*l*) 2 *Bos. and Pul.* 467.

"his

" his heirs, executors, or adminiſtrators can prove, by evidence " or otherwiſe, to abide by the report of three eminent hop- " merchants, who ſhall make it appear, to the ſatisfaction of the " ſaid *John Bray*, his executors, adminiſtrators and aſſigns, that " the revenue received by Government, by reaſon of the duties " now aſſeſſed by Parliament upon hops grown in *Great Britain*, " ſhall, in the preſent or any one year hereafter, amount to a full " and clear revenue, or ſum of 200,000*l.* ſuch duties to be taken " according to thoſe at preſent impoſed by Parliament, and not to " be affected by any ſubſequent alteration whatever: and, for ſe- " curing the due payment of the ſaid annuity of 105*l.* until ſuch " event, the ſaid *William Randall* hath entered into the above writ- " ten bond, or obligation. Now, therefore, the condition of the " above-written bond or obligation is ſuch, that if the ſaid *William* " *Randall*, his heirs, executors, adminiſtrators or aſſigns, ſhall " and do, from the day of the date of the above bond, well and " truly pay, or cauſe to be paid unto the ſaid *John Bray*, or his " aſſigns, one annuity, or clear yearly ſum of 105*l.* of lawful " money of *Great Britain*, on the 1ſt day of *May* in each and " every year, without any deduction or abatement whatſoever, " until the ſaid *William Randall*, his heirs, executors, or ad- " miniſtrators ſhall prove, by evidence or otherwiſe, by the re- " port of three eminent hop merchants, who ſhall make it appear, " to the ſatisfaction of the ſaid *John Bray*, or his aſſigns, that the " revenue received by Government by reaſon of the duties now " aſſeſſed by Parliament upon hops, ſhall, in the preſent or any " one year hereafter, amount to a full and clear revenue or ſum " of 200,000*l.* ſuch duties to be taken according to thoſe at the " preſent time impoſed by Parliament, and not to be affected by " any ſubſequent alteration therein, and ſhall and do make the " firſt payment of the ſaid annuity of 105*l.* on the firſt day of " *May*, in the year of our Lord 1802, then and in ſuch caſe, or " caſes, the above-written bond or obligation, ſhould be void and " of none effect, otherwiſe it ſhall be and remain in full force and " virtue." *Randall* received the 210*l.* in purſuance of the bond. Before the bringing of this action the plaintiffs applied to the defendant, ſtating that they conſidered the bond to be illegal, and demanding the return of the 210*l.* and 6*l.* intereſt, which was refuſed,

Lord

Lord *Alvanley*, Ch. J. ſaid, "It appears to me to be clear that the plaintiffs in this caſe are entitled to recover back the money which has been advanced by the bankrupt. In the preſent tranſaction there was no moral turpitude whatever: and though it has ſometimes been held, that where there is moral turpitude in the contract, the court will not allow the party who has advanced money on ſuch a contract to recover it back; yet no argument of that ſort can be urged in the preſent caſe. The ſimple ſtatement of this caſe is, that, after the money had been paid, but before the time had arrived at which the event in contemplation of the parties contracting was to take place, it was found out that the contract was illegal; and therefore the money paid was demanded back again. There is hardly any caſe of this ſort in which the diſtinction between immoral and illegal tranſactions has not been taken. I do think that there is a material diſtinction between wages which are not recoverable on account of ſome inconvenience which the public may ſuſtain by the open diſcuſſion of the queſtions to which they give riſe, and thoſe which are in themſelves immoral. In the preſent caſe one party has paid money without any conſideration, and is therefore entitled to recover it back from the party to whom he paid it."

Heath, J. "I am of the ſame opinion. It ſeems to me that the diſtinction adopted by Mr. Juſtice *Buller* (*m*) between contracts *executory* and *executed*, if taken with thoſe modifications which he would neceſſarily have applied to it, is a ſound diſtinction. Undoubtedly there may be caſes where the contract may be of a nature too groſsly immoral for the court to enter into any diſcuſſion of it; as where one man has paid money by way of hire to another to murder a third perſon. But where nothing of that kind occurs, I think there ought to be a *locus pœnitentiæ*, and that a party ſhould not be compelled againſt his will to adhere to the contract."

The other Judges were of the ſame opinion; but the court obſerved, that in an action for money had and received nothing but the net ſum advanced, without intereſt, could be recovered; and that the verdict muſt therefore be entered for the 210*l.* only.

(*m*) *Doug.* 470.

It

It has, indeed, been decided, that if a ſum of money be depoſited upon the event of an illegal wager, it may be recovered back even after the event of the wager.

Thus, in the caſe of *Lacauſſade* v. *White*, (*n*) which was an action of aſſumpſit on an agreement made on the 11th of *January*, 1797, by which the defendant, in conſideration that the plaintiff had paid him 100*l.* agreed to pay the plaintiff 300*l.* "if articles forming a baſis of peace, and ſigned by ſome official characters, by which hoſtilities would ceaſe, and would not recommence, were not ſettled between *England* and *France*, on or before the 11th of *September*, 1797." The declaration alſo contained the common money counts. On the trial before Lord *Kenyon*, Ch. J. it was admitted that the wager was illegal, and that the plaintiff could not recover on the ſpecial count: but, by the direction of the learned Judge, the plaintiff obtained a verdict for the 100*l.* paid by him to the defendant, which the defendant's counſel afterwards moved to ſet aſide; and he took a diſtinction between caſes of this ſort, where the contract on which the wager turned was *executed*, and where it was *executory*. He admitted, where a wager is illegal, either party may recover back his depoſit ſo long as the contract remains *executory*, that is, before the event happens which was to decide the wager; but he contended that, after the happening of ſuch an event, it was too late for the loſer to inſiſt on a return of his ſtake.

But the court refuſed the rule, ſaying, that it was more conſonant to the principles of ſound policy and juſtice that wherever money has been paid upon an illegal conſideration, it may be recovered back again by the party who has thus improperly paid it, than, by denying the remedy, to give effect to the illegal contract.

An action will lie to recover back money won, and paid over to the winner where any fraudulent means have been uſed, ſuch as falſe dice, or by packing of cards, &c. (*o*)

(*n*) 7 *Term Rep.* 535. 2 *Eſp. Rep.* 629. *S. C. But ſee the caſe of* Vandyck v. Hewit, 1 *Eaſt* 98. *in which Mr. Juſtice* Le Blanc *ſays*, "The ground of the determination in *Lacauſſade* v. *White*, has been ſince "very much canvaſſed, in a later caſe of *Howſon* v. *Hancock*, (*poſt* 125.) "where it was conſidered that money depoſited upon an illegal wager, "and paid over to the winner, could not be recovered back from him."

(*o*) Harris v. Bowden, *Cro. Eliz.* 90. *F. N. B.* 95. D. *See alſo Com. Dig. tit.* Action upon the Caſe for a Deceit. (A. 1.)

5. *Of*

5. *Of Money depoſited with a Stakeholder, upon an Illegal Contract, or Wager.*]—If money be depoſited with a ſtakeholder, on the event of a battle to be fought by the parties laying the wager, and it be not paid over, though the battle be fought, each party may recover from the ſtakeholder the ſum depoſited by him.

Thus, in the caſe of *Cotton* v. *Thurland*, (*p*) which was an action for money had and received, to recover back fifteen guineas, which had been depoſited by the plaintiff, as his ſhare of a ſtake, in the defendant's hands, upon the event of a boxing match between the plaintiff and another perſon. There was ſome diſpute as to the event of the battle which was fought, the plaintiff being ſuppoſed to have loſt it by ſtriking a foul blow; but the defendant having been warned by a friend of the plaintiff not to pay the money over till the parties met, and the matter was decided, the defendant promiſed that he would not. Mr. Juſtice *Groſe*, before whom the cauſe was tried, was of opinion that the money having been depoſited with the defendant for an illegal purpoſe, could not be recovered back by the plaintiff; and therefore directed a nonſuit. But a rule was afterwards obtained to ſhow cauſe why the nonſuit ſhould not be ſet aſide, and a new trial granted. The caſe which governed the opinion of the learned Judge at the trial was a caſe of *Camm* v. *Alder*, before *Wilſon*, J. at the *Worceſter* ſpring aſſizes, 1790. It was an action for money had and received, in which it appeared that the plaintiff and another perſon depoſited in the defendant's hands five guineas each, as a wager, upon the event of a boxing match between the plaintiff and another man. The battle was fought, and the action was brought only to recover the five guineas depoſited by the plaintiff: but *Wilſon*, J. upon the opening of the caſe, was of opinion, that the tranſaction was illegal, and nonſuited the plaintiff. And he cited a caſe determined by Lord *Mansfield*, at *Guildhall*, where a perſon lent 50*l.* to another, who was to fight for that ſum, upon condition that, if he won, he was to have the 50*l.* again. The borrower won the battle, and the action was brought againſt him by the lender to recover the 50*l.* ſo lent; but Lord *Mansfield* thought the tranſaction illegal, and nonſuited the plaintiff.

(*p*) 5 *Term Rep.* 405. *Vide* Lacauſſade v. White, *ante*, 123; *And ſee* Diſney *on Gaming and Wagers*, *cap.* 2.

The

The court, however, in this caſe, determined that the plaintiff was entitled to recover; and they accordingly made the rule abſolute for ſetting aſide the nonſuit.

Lord *Kenyon*, Ch. J. ſaid, "This action is brought, not againſt one of the parties laying the wager, but a ſtake-holder; and therefore this is not like the caſe of a policy of inſurance, where, the riſk having been run, the party has attempted to recover his money again. I cannot, indeed, diſtinguiſh this caſe from that which was tried before Mr. J. *Wilſon*; for though it was agreed, on all hands, that the battle in that caſe was won by one of the combatants, I think this was, in effect, the ſame thing. But that was only a determination at *Niſi Prius*; and, in the hurry of buſineſs of that kind, the moſt able Judges are liable to err. To that deciſion I cannot give my conſent. If the defendant in this caſe had paid over the money to the winner, perhaps he would not have been anſwerable in this action: but here the money is ſtill in his hands; and therefore I think that the plaintiff may recover it from him."

Aſhhurſt, J. ſaid, "I am of the ſame opinion: there is neither equity or conſcience on the part of the defendant; for if the contract were illegal between the parties to the wager, yet as long as the money remains in his hands he is anſwerable to ſome one for it: and if the event, on which the wager was laid, be not decided, he ought to reſtore one half of the money to each party."

But where money depoſited upon an illegal wager has been paid over to the winner by the conſent of the loſer, the latter cannot afterwards maintain an action againſt the former, to recover back his depoſit.

Thus, in the caſe of *Howſon* v. *Hancock*, (*q*) which was alſo an action of *indebitatus aſſumpſit* for money had and received. It appeared that the plaintiff and the defendant had laid two wagers, the one of 10*l.* and the other of 3*l.* 16*s.* on the event of a horſe-race, prohibited by the ſtatute 10 *Geo.* 2. c. 19. ſ. 2., and depoſited the money in the hands of certain ſtake-holders. The event having terminated in favour of the defendant, both ſums were paid over to him, the firſt by the expreſs direction of the plaintiff, the latter, (as the jury found) with his concurrence; and the preſent action was brought to recover back thoſe ſums from the defend-

(*q*) 8 *Term Rep.* 575.

ant.

ant. It was inſiſted at the trial, on the part of the defendant, that as the wager had been fairly won, and as the money had been paid to him with the conſent of the plaintiff, the latter could not recover it back in this action; and Mr. Baron *Chambre* being of this opinion, nonſuited the plaintiff, with leave to him to move to ſet aſide the nonſuit, and to enter a verdict for 13*l.* 16*s.* if the Court of *King's Bench* ſhould be of opinion that he was entitled to recover: but the court determined that the plaintiff was not entitled to recover, and that the nonſuit was proper.

Lord *Kenyon*, Ch. J. ſaid, "There is no caſe to be found where, when money has been actually paid by one of two parties to the other upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back again: and the authorities which have been referred to of the two learned Judges in the Court of *Common Pleas* * are in favour of the defendant's rights to retain the money ſo paid. Here the money was not paid on an immoral, though on an illegal conſideration; and though the law would not have enforced the payment of it, yet, having been paid, it is not againſt conſcience for the defendant to retain it. This is very different from the caſe of *Lacauſſade* v. *White*, where the money was recovered from the ſtake-holder before it had been paid over.

In the caſe of *Edgar* and another, aſſignees of *Carden*, a bankrupt, *v. Fowler*, and another, (*r*) where credit was given by inſurance brokers, in an account delivered in by them to an underwriter for the premiums of re-aſſurances, declared illegal by the ſtat. 19 Geo. 2. c. 37. after which the aſſured gave notice to the brokers not to pay the money over to the underwriter, and indemnified them for withholding it. It was determined that the underwriter could not maintain an action againſt the brokers to recover ſuch premiums as for money had and received by them to his uſe, the tranſaction being illegal, and the money not having been actually paid, but only credit given for it in account.

Lord *Ellenborough*, Ch. J. ſaid, "The money does not appear to have been actually paid into the defendant's hands. In caſe of illegal tranſactions, it may always be ſtopped while it is *in tranſitu*

* Buller, *Juſt. in* Tenant v. Elliott, 1 *Bos. and Pul.* 3. *And* Eyre, Ch. J. *in* Farmer v. Ruſſell, *Ib.* 298. (*r*) 3 *Eaſt Rep.* 222.

to the perſon who is entitled to receive it. If, indeed, this had been a legal tranſaction, the money, perhaps, might have been conſidered as paid. But we will not aſſiſt an illegal tranſaction in any reſpect. We leave the matter as we find it: and then the maxim applies, *melior eſt conditio poſſidentis.* We cannot conſider this as money paid for the uſe of the bankrupt: no money has, in fact, been paid, but only an account ſtated. If we were to ſuſtain the plaintiff's demand, we ſhould be compelling the execution of an illegal contract, as if it were a legal one.

So, this action will not lie to recover back money depoſited for the purpoſe of being paid to one for his intereſt in ſoliciting a pardon for a perſon under ſentence of death.

Thus, in the caſe of *Norman* v. *Cole*, (*s*) which was an action for money had and received. It was brought to recover a ſum of 30*l.* which had been depoſited in the hands of the defendant, under the following circumſtances:

One *Tunſtall* being under ſentence of death, in *Newgate*, the plaintiff was prevailed upon to lodge that ſum in the hands of the defendant, to be applied to the purpoſe of procuring him a pardon.

On the caſe being opened, Lord *Eldon*, Ch. J. expreſſed his doubt, whether the action was maintainable, ſaying, that he would hold the plaintiff to very ſtrict proof of the means uſed to procure the pardon; and called on the plaintiff's counſel to ſhow upon what grounds they founded their right to recover.

They ſtated, that *Tunſtall* was a man of good character before his conviction; that one *Morland* being a perſon of good connections, and having acceſs to perſons of intereſt, the money was to be given to him for ſo uſing his intereſt, by repreſenting, in favourable terms, the caſe and character of *Tunſtall*. His Lordſhip then ſaid, "I cannot ſuffer this cauſe to proceed. I am of opinion this action is not maintainable. Where a perſon interpoſes his intereſt and good offices to procure a pardon, it ought to be done gratuitouſly, and not for money: the doing an act of that deſcription ſhould proceed from pure motives, not from pecuniary ones. The money is not recoverable."

(*s*) 3 *Eſp. Rep.* 253.

6. *Of*

6. Of Money Paid on Illegal Insurances in the Lottery, &c.]— Money paid as a premium for illegal insurances in the lottery is recoverable back, by action of *indebitatus assumpsit* for money had and received.

Thus, in the case of *Jaques* v. *Golightly*, (*t*) which was an action of *indebitatus assumpsit* for money had and received. At the trial it was proved that, on the 1st of *January*, 1775, the plaintiff insured many lottery tickets, in various manners, at the defendant's office. The whole amount of the premiums by him paid was 64*l.* 17*s.* 6*d.* Upon some of the chances the plaintiff was a loser, in more a winner. The balance due to him was 90*l.* This the defendant refused to pay, alleging that the insuring was illegal, but insisted on retaining the premiums; and upon this evidence a verdict was found for the plaintiff, damages 64*l.* 17*l.* 6*d.* The counsel for the defendant moved for a new trial, upon the ground that the contract was void and illegal by the stat. 14 *Geo.* 3. c. 76. and the plaintiff entitled to no relief, because he was *particeps criminis*, and knowingly transgressing a public law.

But the court refused the rule, and determined that the plaintiff was entitled to recover; and *De Grey*, Ch. J. said, "This is an application for favour by a man knowingly transgressing. He says, and says rightly, that the insurance contract was null and void. He has therefore a scruple in conscience not to pay the money won by the plaintiff, because the play was illegal; but he has no scruple to receive and retain the consideration money. I think the verdict right."

Blackstone, J. said, "These lottery acts differ from the stock-jobbing act of the 7 *Geo.* 2. c. 8. because there both parties are made criminal, and subject to penalties; but the losing party is indemnified from those penalties, in case he sues and recovers back the money lost from the winner. It was therefore necessary, in the preceding clause, to give the loser a power to maintain such an action. But here, (on the part of the insured, the contract on which he has paid his money is not criminal, but merely void; and therefore, having advanced his premium without any consideration, he is entitled to recover it back."

(*t*) 2 *Bl. Rep.* 1073. *See also* Jacques v. Withy, 1 *H. Bl.* 65. *S. P.*

So,

So, if a ſervant illegally inſures in the lottery, and pays the premiums of inſurance with his maſter's money, the money ſo paid may be recovered back by the maſter, in an action for money had and received againſt the lottery-office keeper.

Thus, in the caſe of *Clarke* v. *Shee* and *Johnſon*, (*u*) which was alſo an action for money had and received. At the trial, a verdict was found for the plaintiff, damages 459*l.* 4*s.* 4*d.* ſubject to the opinion of the court, upon the following caſe:

David Wood being a clerk to the plaintiff, a brewer, and receiving money from the plaintiff's cuſtomers, and alſo negotiable notes for the plaintiff's uſe, in the ordinary courſe of buſineſs, paid ſeveral ſums with the ſaid money and notes, at different times, to the amount of 459*l.* 4*s.* 4*d.* to the defendants, upon the chances of the coming up of tickets in the ſtate-lottery of 1772, contrary to the lottery act of the ſaid year 1772.

The court determined that the plaintiff was entitled to recover in this action: and Lord *Mansfield*, Ch. J. ſaid, "This is a liberal action, in the nature of a bill in equity; and if, under the circumſtances of the caſe, it appears that the defendant cannot, in conſcience, retain what is the ſubject-matter of it, the plaintiff may well ſupport this action. There are two ſorts of prohibitions enacted by poſitive law, in reſpect of contracts. 1ſt, To protect weak or neceſſitous men from being over-reached, defrauded, or oppreſſed. There the rule *in pari delicto, potior eſt conditio defendentis*, does not hold, and an action will lie; becauſe where the defendant impoſes upon the plaintiff, it is not *per delictum*.

The next ſort of prohibition is founded upon general reaſons of policy and public expedience. There both parties offending are equally guilty, *par eſt delictum, et potior eſt conditio defendentis*. The prohibition in the lottery act, ſtat. 12 *Geo.* III. c. 63, is of this ſort; and in this caſe no doubt but the defendant and the witneſs, *Wood*, were equally guilty. Therefore, at *Guildhall*, upon the firſt impreſſion, I was of opinion againſt the plaintiff; becauſe I thought that the maſter could not ſtand in a better ſituation than the ſervant, and the ſervant was clearly *particeps criminis*. But I changed my opinion: I thought, and now think, the plaintiff does not ſue, as ſtanding in the place of *Wood*, his clerk: for the money and notes which *Wood* paid to the defendants are the identical notes

(*u*) *Cowp.* 197. *Loft.* 756. *S. C.*

and money of the plaintiff. Where money or notes are paid *bonâ fide*, and upon a valuable conſideration, they never ſhall be brought back by the true owner; but where they come *malâ fide* into a perſon's hands, they are in the nature of ſpecific property; and if their identity can be traced and aſcertained, the party has a right to recover. It is of public benefit and example that he ſhould; but otherwiſe if they cannot be followed and identified, becauſe there it might be inconvenient, and open door to fraud. *Miller* v. *Race*, 1 Burr. 452. The identity was traced through different hands and ſhops. Here the plaintiff ſues for his identified property, which has come to the hands of the defendants iniquitouſly and illegally, in breach of the act of parliament. Therefore they have no right to retain it; and conſequently the plaintiff is well entitled to recover."

But, in the caſe of *King* v. *Scrape*, (*v*) which was an action for money had and received, brought to recover ſeveral ſums of money, ſtated to have been paid by the plaintiff to the defendant, for illegal inſurances in the lottery, in the years 1793 and 1794.

A witneſs of the name of *Felton*, called by the plaintiff, proved that he, in the beginning of the lottery, contracted with the defendant to inſure for each day of the drawing, at a ſettled price of inſurance for each day; that he made inſurances with different perſons, on his own account, which he re-aſſured with the defendant, reſerving to himſelf a certain profit *per cent.* He then proved, that *King*, the plaintiff, as well as other perſons, inſured the ſeveral numbers, which he mentioned, with him (the witneſs), which he daily re-aſſured with *Scrape*, the defendant; but added, that he never informed *Scrape* of the perſons whoſe numbers he had inſured. This tranſaction was in 1794. Another witneſs was called, who proved that in 1793, *King* had inſured in that year with *Scrape*, but that on the balance of the account, the plaintiff was in defendant's debt, the ſums paid by the defendant having exceeded the money received as premiums.

Eyre, Ch. J. ſaid, "The caſe of *Clarke* v. *Shee* (*w*) does not come up to the preſent. Here the plaintiff's money was paid over to the defendant by the plaintiff's ſervant; the property paſſed directly from the plaintiff to the defendant, and he could follow it into the defendant's poſſeſſion. But in the preſent caſe the pro-

(*v*) 1 *Eſp. Rep.* 432. (*w*) *Ante*, 129.

perty is changed by the intervening contract with *Felton*, and became veſted in him: there is therefore no contract with the defendant in this action. Though there may be ſome doubt as to the ſituation of the witneſs, whether he was not the agent of the defendant, and the money paid to him for the defendant's uſe, yet as there is no direct evidence offered to ſupport it, it muſt be taken, from the evidence of *Felton*, to be otherwiſe, and the tranſaction to have been on his own account.

As to the tranſaction in 1793, as it there appears, that after payments and allowances on both ſides, there was a balance in favour of the plaintiff, he therefore can have no right to maintain an action for money had and received, as he had in fact received more money than he paid." The plaintiff was therefore nonſuited.

So, money paid by the *inſurer*, or lottery-office keeper to the *inſured* cannot be recovered back.

Thus, in the caſe of *Browning* v. *Morris*, (*x*) which was an action for money had and received. The facts were as follow: The plaintiff and defendant were both lottery-office keepers; and during the drawing of the lottery, entered into an agreement mutually to inſure the number of a ticket with each other, upon condition, that he whoſe number ſhould be drawn on the day next following the agreement, ſhould receive from the other an undrawn ticket, or the value of it at the market price. The defendant's number being drawn, he choſe the price of an undrawn ticket, which came to 14*l.* 3*s.*, and received that ſum from the plaintiff. The next day each inſured another number, upon the ſame terms. And ſo the contract continued from day to day. It afterwards happened, that the plaintiff's number was drawn, when the defendant, inſtead of complying with the terms of the agreement, as the plaintiff had done, refuſed to give the plaintiff, either an undrawn ticket, or the value of one. Neither of them had any tickets in their poſſeſſion, the conſequence of which was, that the contract was illegal, and againſt the ſtatute. But the queſtion was whether the plaintiff was entitled, in diſaffirmance of the contract, to recover back the ſum which he had paid upon this illegal tranſaction?

(*x*) *Cowp.* 790. *See alſo* Drummond v. Deey, 1 *Eſp. Rep.* 152. *S. C.*

The court were of opinion that the plaintiff was not entitled to recover; for it was obſerved, the plaintiff did not bring his action for money paid by him to the defendant for *inſuring*; but for money paid by him to the defendant in conſequence of his having *inſured* the defendant's tickets. So that the plaintiff was not only in *pari delicto*, but alſo ſtood in the light, and under the deſcription of that ſpecies of inſurer from whom the ſtatute meant to protect the unwary.

13. *In what Caſes an Action of* Indebitatus Aſſumpſit *lies to try the Right to an Office, or to Fees in reſpect thereof; and alſo to Prize Money, &c.*

In this form of action it is not unuſual to try the title to an office to which there are known and accuſtomed fees annexed. Thus where two perſons claim title to an office, and one receive the profits, either by himſelf, or his collector, the other may bring *indebitatus aſſumpſit* for money had and received, wherein the title muſt be proved. (*y*) But ſuch action muſt be brought againſt the principal, and not againſt the collector. (*z*)

So, where a perſon is entitled to an office, with fees annexed, and a ſtranger intrudes into the office, and receives the fees, this form of action lies to recover them: But they muſt be certain, known, and accuſtomed fees annexed to the office, and ſuch as the legal officer could himſelf recover in a court of law from the perſons of whom they are claimed and received.

Thus, in the caſe of *Boyter* v. *Dodſworth*, (*a*) which was an action for money had and received, brought to recover back fees received by the defendant to the uſe of the plaintiff, as belfry ſexton, and church ſexton of the cathedral of *Saliſbury*. The plaintiff claimed under two patents in 1777, from the treaſurer of the church, confirmed by the Dean and Chapter, granting to him for a valuable conſideration the above offices for life. The one granted to him the office of belfry ſexton, "together

(*y*) 2 *Mod.* 260. 263. 3 *Lev.* 262. 2. *T. Jon.* 127. 1 *Dan.* 27.
(*z*) 4 *Burr.* 1984. *Bul. N. P* 113.
(*a*) 6 *Term Rep.* 631. *See alſo* Green *v.* Hewitt, *Peake*, 122.

with

with the right and full power of keeping keys to and for the doors of the ſaid church, with free liberty of ingreſs, egreſs and regreſs into and from the ſaid church for cleanſing, ſhowing, or otherwiſe officiating in the ſame." The other granted to him the office of church ſexton, " together with all fees, wages and profits belonging, &c. in as large and ample a manner as *S. C.*, (his predeceſſor,) &c. had, &c." The plaintiff having proved theſe patents, and ſtated that the defendant had lately intruded into theſe offices, and had received ſeveral ſums of money from ſtrangers to whom the church had been ſhown, *Buller*, J., before whom the cauſe was tried, called on the plaintiff's counſel to prove that there were certain known and accuſtomed fees annexed to the offices, and that the defendant had received fees, ſuch as the legal officer could himſelf recover in a court of law from the perſons to whom the church was ſhown. It was admitted that there were no ſuch regular fees, but that it was uſual for different perſons to give what ſums they pleaſed: the learned judge nonſuited the plaintiff.

A motion, however, was afterwards made for a rule to ſhow cauſe why the nonſuit ſhould not be ſet aſide, and a new trial granted: But the court refuſed the rule, and determined, that money given to *A.* and claimed by *B.*, as perquiſites of office, cannot be recovered by *B.* in an action for money had and received, unleſs ſuch perquiſites be known and accuſtomed fees.

Lord *Kenyon*, Ch. J. ſaid: "There is no ground on which this action can be ſupported. If there had been certain fees annexed to the diſcharge of certain duties belonging to this office, and the defendant had received them, an aſſize would have lain; and the action for money had and received to recover fees has always been conſidered as being ſubſtituted in the place of an aſſize. But there is no pretence to ſay, that an aſſize will lie for a gratuity for money given, which the party might have refuſed to give if he had pleaſed. And with regard to natural juſtice, the perſon who performs the duty is, in juſtice, entitled to the money given for ſuch duty: here the defendant, in fact, performed the ſervice, and on principles of natural juſtice he is entitled to the reward. If there had been regular fees due for the duties performed, and the defendant had intruded into the offices, the plaintiff might either have ſupported an action

for money had and received, or for diſturbing him in his offices."

So, the nominee of a perpetual curacy, not having ſubſcribed the articles, or been licenſed by the biſhop, cannot maintain an action for money had and received againſt one who is in poſſeſſion of the profits, and who likewiſe claims to be curate, and has been licenſed by the biſhop.

Thus, in the caſe of *Powel* v. *Milbank*, (*b*) which was an action for money had and received, brought by the plaintiff, as nominee of the perpetual curacy of *Cheſter le Street*, againſt the defendant, who was in poſſeſſion of the profits, and claimed likewiſe to be curate.

At the trial, the plaintiff ſet up a title under Mr. and Mrs. *Jolliffe*, who had nominated him to this living as a donative, and likewiſe under a nomination from the Great Seal, which was directed to the biſhop in the uſual form of preſentations. As to the title under the crown, it was proved that this formerly belonged to the deanery of the collegiate church of *Cheſter le Street*, and came to the crown on the diſſolution of monaſtries, and continued in the hands of the crown till 16 *Jac.* 1., when the deanery was granted away by the crown, excepting all advowſons, donations, diſpoſitions, and rights of patronage to all churches, vicarages, chapels, &c., and reſerving the annual ſum of 10*l.* to be paid to the curate for the time being. No nomination or preſentation could be proved by the crown ſince the 16 *Jac.* 1., but two or three, and no more, were ſhown by perſons claiming under the grant. The plaintiff then entered on his title under Mr. and Mrs. *Jolliffe*, and proved the nomination under their ſeals: that he had taken the oaths of allegiance and ſupremacy before them, and that he produced his nomination to the biſhop, and tendered himſelf to ſubſcribe the articles, and make the declaration of conformity before him: but the biſhop refuſed to ſuffer him to do it, becauſe he had before licenſed the defendant; and the plaintiff never was licenſed by the biſhop.

A caſe was reſerved for the opinion of the court, whether the plaintiff could recover the profits in this action.

The court were of opinion, that the plaintiff could not: And Lord *Mansfield*, Ch. J. ſaid: "It ſeems impoſſible to maintain

(*b*) *Mich.* 12 Geo. III. *B. R.* 1 *Term Rep.* 399. *n. d.*

this

this action againſt the defendant, who is completly in poſſeſſion. A licenſe is never neceſſary if this action can be maintained, and you may as well bring an action for money had and received, where a man is not in poſſeſſion, inſtead of an ejectment. Here this muſt be taken to be a cure of ſouls, for it is ſtated to be a pariſh; and in that caſe it is expreſsly required that there ſhould be a ſubſcription."

Aſton, J. ſaid: "This muſt be taken to be a benefice with cure, and then it is within the act of parliament, which ſays, that no perſon ſhall be admitted till he has firſt ſubſcribed the articles; and there is a diſtinction between ſubſcribing and reading the articles."

Where fees of office are demanded and received, but the party paying them diſputes the receiver's right to them, or his own liability to be charged, an action of *indebitatus aſſumpſit* for money had and received will lie to try the queſtion between them.

Thus, in the caſe of *Andrews* v. *Cawthorne*, (*c*) which was an action of *indebitatus aſſumpſit* for money had and received, to recover back the ſum of 3*s*. 4*d*. received by the defendant, by order of Dr. *Vernon*, rector of *St. George's Bloomſbury*, as a burial fee claimed by the Doctor for the burial of *A. M.* in the new church-yard aſſigned and belonging to the pariſh of *St. George's Bloomſbury*, by virtue of the ſtats. 9 *Anne*, c. 22. 10 *Anne*, c. 11. 1 *Geo.* I. ſtat. 1. c. 23. 4 *Geo.* I. c. 14. and 3 *Geo.* II. c. 19. But the burial fees of this pariſh had not been fixed by the commiſſioners mentioned in the ſtat. 3 *Geo.* II. c. 19.

The court determined, that no burial fee is due at common law: but it may be due by cuſtom in any particular pariſh: and, with reſpect to *St. George's Bloomſbury*, the burial fees muſt firſt be fixed by certain commiſſioners, as directed by the ſtat. 3 *Geo.* II. c. 19. before they are demandable.

So, this form of action lies to recover back monies demanded and received by one, as Mayor, which were not due to him, but to the chamberlain, who afterwards claimed the amount, and compelled the plaintiff to pay it a ſecond time. (*d*)

(*c*) *Willes*, 536. (*d*) Bonnel v. Foulk, 2 *Sid.* 4.

This form of action alſo lies againſt a poſt-maſter, for receiving more money than he is entitled to for the delivery of letters, or for receiving money of a perſon claiming the privilege of franking. (*e*)

So, if *A.* receives rent of the tenants of *B.* under pretence of title, it is ſaid, an action of *indebitatus aſſumpſit* for money had and received lies againſt him; for in ſuch caſe an account will lie: and wherever account lies, an *indebitatus aſſumpſit* will lie. (*f*) But Mr. *Gwillim*, in his edition of *Bacon's* Abridgment, (*g*) puts this *quære*, whether, when the defendant claims title, an action of *aſſumpſit* for the rents received will lie againſt him? for he adds, that *Wilſon*, J., in ſuch an action, (*h*) nonſuited the plaintiff; and was of opinion, that the mode of proceeding was either by ejectment, or where that could not be brought, by an action againſt the tenant for the rent wrongfully paid by him to the perſon not entitled to it.

Of Prize Money.] It is ſaid (*i*) to be eſtabliſhed upon the authority of a regular ſeries of deciſions, that the queſtion of "prize or no prize," cannot be tried at common law, but muſt be tried before the Judge of the High Court of Admiralty; and that the juriſdiction depends not upon the locality, or upon the parties, but upon the nature of the queſtion; which is ſuch as is not to be tied by any rules of the common law, but by a more general law, the law of nations, adminiſtered by forms beſt adapted to the ſubject of its juriſdiction, and the intereſt of all the parties.

But, after the court of prize have pronounced ſentence in favour of the captors, and the property captured is ſold, and converted into money for the purpoſe of being duly diſtributed amongſt the captors, an action at common law for money had and received will lie at the ſuit of any one of the captors for his ſhare, either againſt the agent (*k*) who withholds it, or

(*e*) Smith v. Dennis, *Loft.* 753. *Lord* Petre v. *Lord* Auckland, 2 *Bos. & Pul.* 139.

(*f*) Per *curiam*, 2 *Mod* 263. 12 *Mod.* 324. 1 *Dan. Abr.* 27.

(*g*) 1 *Vol.* 260. (*h*) Cunningham *and wife* v. Lawrents, *Clk.* Worceſter, *Spring Aſſizes*, 1788.

(*i*) Vide 2 *Bro. C. P.* 429. 8*vo ed.*

(*k*) 4 *Eaſt Rep.* 238. 3 *Bos. & Pul.* 257. 6 *Eaſt Rep.* 220.

againſt

againſt the perſon to whom ſuch ſhare may have been wrongfully paid. (*l*)

So, the captor of a prize may legally aſſign his ſhare therein before condemnation; and the aſſignee may maintain *indebitatus aſſumpſit* for money had and received to his uſe, againſt the ſhip's agent for not paying it over to him after condemnation, &c. (*m*)

But every inſtrument, by which a ſeaman or marine conveys his prize money or wages in the hands of the public officers, muſt be drawn in the form preſcribed by 26 *Geo.* III. c. 63. and the ſtatutes to which it refers; (*n*) otherwiſe it will be void.

(*l*) *Doug.* 324. 1 *H. Bl.* 261. 8 *Term Rep.* 224. 2 *Eaſt Rep.* 504.
(*m*) Morrough *v.* Comyns, 1 *Wils.* 211.
(*n*) Turtle *v.* Hartwell, 6 *Term Rep.* 426. Macdonald *v.* Paſley, 1 *Bos. & Pul.* 161.

For more concerning the Action for Money Had and Received; vide *Vol.* 1. tit. *Infants Partners, Truſtees, Bankrupts and their Aſſignees, Executors and Adminiſtrators.*

CHAPTER

CHAPTER II.

Of Money Lent and Advanced.

MONEY lent by one perſon to another, may be recovered by action of *indebitatus aſſumpſit*. So, where money is advanced to *B.* at the requeſt of *A.*, who undertakes to be accountable for it, the lender may maintain an action of *indebitatus aſſumpſit* againſt *A.* for ſo much money lent and advanced to him.

Thus, in the caſe of *Harris* v. *Huntback*, (*a*) which was an action of *indebitatus aſſumpſit* for money lent and advanced by the plaintiff to the defendant, and at his requeſt. Upon the trial a note of the defendant's was produced in evidence by the plaintiff, in the following words: "3d *December*, 1751, Received of Mr. *Harris* the ſum of 19*l. on the behalf of my grandſon*, which I promiſe to be *accountable* for on demand. Witneſs my hand *S. Huntback*." It appeared that the grandſon was an infant at the time of advancing the money. A verdict was found for the plaintiff, ſubject to the opinion of the court upon this queſtion, *viz.*, whether this evidence was ſufficient to ſupport the declaration?

On behalf of the defendant it was objected, that the note in queſtion could not be conſidered as evidence of money lent, but only as a collateral undertaking; upon which an *indebitatus aſſumpſit* will not lie.

For the plaintiff it was contended, that a note of hand acknowledging the receipt of money and promiſing to be *accountable* for it, is tantamount to a promiſe to pay it, and evi-

(*a*) 1 *Burr.* 373.

dence

dence of money lent. And its being added "*on behalf of my grandſon*," makes no difference: for there is no remedy againſt the infant: therefore this was an *original*, not a *collateral* undertaking. And of this opinion were the whole court, and judgment was given for the plaintiff.

Lord *Mansfield*, Ch. J. ſaid: "There cannot be clearer evidence of the debt than the note in queſtion. A party may bring *indebitatus aſſumpſit* for the debt, and give the note in evidence; and ſurely it ſupports the declaration. This note, however, is ſaid to be a collateral undertaking. But the argument about original or collateral undertakings depends merely upon the want of ſufficiently defining the terms *original* and *collateral*; otherwiſe there can be no doubt about them. This is clearly an original undertaking."

Deniſon, J. ſaid: "This note is evidence of money lent. And between the plaintiff and defendant, this is certainly an original undertaking: and the money was paid at the defendant's requeſt. And there is no privity between the plaintiff and the infant.

So, if money be lent to *A.* and advanced to *B.* at the requeſt of *A.*, an action of *indebitatus aſſumpſit* on an *implied* promiſe will lie againſt *A.* for ſo much money lent and advanced to him. (*b*) And the declaration, in ſuch caſe, muſt be for money lent and advanced to *A.*; for money lent to a third perſon at another's requeſt is bad.

Thus, in the caſe of *Butcher* v. *Andrews*, (*c*) which was an action of *aſſumpſit* on ſeveral promiſes, one was for ſo much money lent by the plaintiff to *R. A.*, the defendant's ſon, at the inſtance and requeſt of the defendant. Upon *non aſſumpſit* pleaded, there was a general verdict for the plaintiff, and entire damages. But it was moved in arreſt of judgment, that a general *indebitatus aſſumpſit* would not lie againſt the defendant upon this lending of money unto his ſon; for in reſpect to the defendant it is a collateral promiſe, upon which the plaintiff ought to have declared ſpecially, becauſe upon the lending to the ſon, the law cannot raiſe a promiſe by the father, but it will in the ſon who borrowed the money; and the damages being entire made all

(*b*) 1 *Ventr.* 311. 2 *Ventr.* 36. 6 *Mod.* 77.
(*c*) *Carth.* 446. 1 *Salk* 23. *S. C.* Marriot v. Liſter, 2 *Wils.* 141. *S.P.*

naught;

naught: and the court was of that opinion, and the judgment was accordingly arreſted.

Holt, Ch. J. ſaid: "If it had been an *indebitatus* for ſo much money paid by the plaintiff at the requeſt of the defendant unto his ſon, it might have been good, for then it would be the father's debt, and not his ſon's; but when the money is lent to the ſon, it is his proper debt, and not the father's."

It has, however, been determined, that a declaration for money lent to a *feme covert* at the requeſt of her huſband is good.

Thus, in the caſe of *Stephenſon* v. *Hardy*, (*d*) which was an action of *indebitatus aſſumpſit* and the declaration contained eight counts: the ſixth count ran thus, *viz.*: "That the defendant on "ſuch a day and year, was indebted to the plaintiff in 30*l.*, "for money before that time lent by the plaintiff to *Ann* the "wife of the defendant, in his abſence, and at his ſpecial in-"ſtance and requeſt, and being ſo indebted he promiſed payment." It was proved at the trial, that the defendant being about to ſet out upon a voyage to *Ireland*, deſired the plaintiff to lend his, (defendant's) wife money if ſhe ſhould have occaſion for it in his abſence: the plaintiff accordingly did lend her the ſum for which this action was brought. At the trial, the plaintiff obtained a verdict upon all the counts. But the counſel for the defendant afterwards moved the court in arreſt of judgment, upon the ground that a huſband cannot be indebted for money lent to his wife, becauſe ſhe cannot contract or borrow money; but they ſaid, that if it had been alledged that the defendant was indebted in ſo much money advanced by the plaintiff to *Ann*, the wife of the defendant, at his inſtance and requeſt, it would have been right enough; but they argued that the word *lent* was a technical term, the legal idea or meaning of which is ſo certainly eſtabliſhed and fixed, that it is as impoſſible for the huſband to be indebted for money lent to his wife, as it is for *A.* to be indebted to *B.* for money lent to *C.*, a third perſon, and cited *Mariott* v. *Liſter*, 2 *Wilſon*, 141. and 1 *Salk.* 23. 2 *Vent.* 36.

In anſwer to this objection it was argued on behalf of the plaintiff, that money lent to a wife, at the inſtance and requeſt of a huſband, is the very ſame as if it was alleged to have been lent to the huſband himſelf; a wife may make an inchoate con-

(*d*) 3 *Wils.* 398.

tract,

tract, which the husband may afterwards confirm or disaffirm; here the contract is made at his request before, she is only the hand which he makes use of to take and receive the money; the cases cited are very different from this; those were cases of money lent to a third person; this case is money lent to the husband himself, at his request to be delivered into the hands of the wife.

Lord Chief Justice *De Grey* said: "This is a very poor shift of the defendant to delay the payment of a just debt; if goods are delivered to the wife at the instance and request of the husband, he is bound by a contract expressed; if a husband turns his wife out of doors unjustly, and she buys necessaries of life he is bound to pay for the same by an implied promise: he is also bound by all her contracts for necessary goods during cohabitation, and although the goods be actually delivered to her, yet they are goods sold and delivered to him; you cannot make a contract with an infant, but you may plead that you lent an infant money to buy necessaries according to his state and quality, and that the money was laid out in necessaries; it is admitted that if the word advanced had been inserted in the count instead of the word lent, it would have been good; I think, (in this case,) the word lent is the same as the word advanced; and that this is not like the cases cited, which are good law; I think that a loan to the wife, at the request of the husband, is the same in law, as if the loan had been to the husband himself." And of this opinion were all the other judges. The motion for arresting the judgment was therefore discharged.

Where money is lent on a pledge, the lender may recover it by action of *indebitatus assumpsit*, unless there be a special agreement to stand to the pledge only.

Thus, in the case of the *South-Sea Company* v. *Duncomb*, (*e*) upon a trial at bar in an action for money lent, it appeared that 8000*l.* was advanced to the defendant by the plaintiffs in 1720, upon a pawn of 2000*l.* stock. And the defendant not repaying it, the question to be tried was, whether the plaintiffs could proceed against the person of the defendant, or must stand to the remedy against the stock. And after proof of many particulars, to induce a belief that in these loans no regard was had to personal security; the court left it to the jury upon this point,

(*e*) *Stra.* 919. 2 *Barn. B. R.* 48. *S. C.*

that

that where money is generally lent upon a pledge, it will not deprive the lender of his remedy againſt the perſon; and that to diſcharge the perſon of the borrower, there muſt be a ſpecial agreement to ſtand to the pledge only." The jury accordingly found for the defendant.

But in the caſe of the *Governor* and *Company of the Bank of England* v. *Glover*, (*f*) which was an action of *indebitatus aſſumpſit* brought by the plaintiffs againſt the defendant for 454*l.* 18*s.* 3*d.* lent to the defendant by the plaintiffs: At the trial, before *Holt*, Ch. J., the caſe in evidence was as follows; "The defendant, *January* 31ſt, 1700, brought a note of Mr. *Shepherd*, a goldſmith, payable to *Robert Stamper* for 454*l.* 18*s.* 3*d.* to the Bank of *England*, and prayed Mr. *Maddocks*, the caſhier of the bank, to give him a ſpecie bank note payable to the ſaid *Stamper* for the ſaid note of *Shepherd*; which Mr. *Maddocks* refuſed, but told the defendant, that if he would promiſe to pay the bank the 454*l.* 18*s.* 3*d.* in caſe *Shepherd* did not pay the ſaid note, he would give him a ſpecie bank note, payable to himſelf, for the ſaid ſum; to which the defendant agreed. Whereupon Mr. *Maddocks* accepted *Shepherd*'s note, and gave the defendant, *Glover*, a ſpecie bank note of 454*l.* 18*s.* 3*d.* This was done upon the *Friday*. On the *Monday* following *Shepherd*'s note was ſent to him to be paid, but *Shepherd* refuſed to pay it. In the mean time *Glover* gave this bank note to *J. S.* for a debt owing by him to *J. S.*, and *J. S.* received the 454*l.* 18*s.* 3*d.* of the bank." And after debate by the counſel of both ſides, *Holt*, Ch. J. was of opinion, that this evidence did not maintain the action. For (by him) this was not money lent, nor laid out for the uſe of the defendant; but it was a buying of the note of *Shepherd*, with a warranty of it from the defendant; and therefore the plaintiffs might well maintain a ſpecial action, but not a general *indebitatus aſſumpſit*. It was urged by the plaintiffs' counſel, that this note was only a *depoſitum* or pledge. But to that the Chief Juſtice anſwered, that that could not be, becauſe it was not redeemable by the defendant; and redemption is incident to the nature of a pledge. The plaintiffs therefore were nonſuited.

If *A.* lend *ſtock* in the public funds to *B.*, it cannot be recovered in an action of *indebitatus aſſumpſit* as money lent; but the lender

(*f*) 2 *Ld. Raym.* 753.

muſt

muſt declare *ſpecially* upon the promiſe of the borrower; becauſe ſtock is not conſidered as *money*, (*g*)

Money lent to game with, or to pay a gaming debt is recoverable by action of *indebitatus aſſumpſit*; for the ſtatute 9 *Anne*, c. 14. ſ. 1. only avoids *ſecurities* given upon a gaming conſideration, but does not extend to loans. The words of the act are, "That all notes, bills, bonds, judgments, mortgages or other ſecurities or conveyances whatſoever, given, granted, drawn or entered into, or executed by any perſon or perſons whatſoever, where the whole, or any part of the conſideration of ſuch conveyances or ſecurities ſhall be for any money, or other valuable thing whatſoever won by gaming, or playing at cards, dice, tables, tennis, bowls, or other game or games whatſoever, or by betting on the ſides or hands of ſuch as do game at any of the games aforeſaid, or for the reimburſing or repaying any money knowingly lent or advanced for ſuch gaming or betting as aforeſaid, or lent or advanced at the time and place of ſuch play, to any perſon or perſons ſo gaming or betting as aforeſaid, or that ſhall, during ſuch play, ſo play or bett, ſhall be utterly void, fruſtrate, and of none effect to all intents and purpoſes whatſoever; any ſtatute, law or uſage to the contrary thereof in any wiſe notwithſtanding; and that where ſuch mortgages, ſecurities, or other conveyances, ſhall be of lands, tenements or hereditaments, or ſhall be ſuch as incumber or affect the ſame, ſuch mortgages, ſecurities, or other conveyances ſhall enure and be to and for the ſole uſe and benefit of, and ſhall devolve upon ſuch perſon or perſons as ſhould or might have or be entitled to ſuch lands, tenements or hereditaments, in caſe the ſaid grantor or grantors thereof, or the perſon or perſons, ſo incumbering the ſame, had been naturally dead, and as if ſuch mortgages, ſecurities, or other conveyances had been made to ſuch perſon or perſons, ſo to be entitled after the deceaſe of the perſon or perſons ſo incumbering the ſame; and that all grants or conveyances to be made for the preventing of ſuch lands, tenements or hereditaments, from coming to or devolving upon ſuch perſon or perſons hereby intended to enjoy the ſame as aforeſaid, ſhall be deemed fraudulent and void, and of none effect to all intents and purpoſes whatſoever."

(*g*) 5 *Burr.* 2589. 2 *Bl. Rep* 684. 1 *Eaſt Rep.* 1.

Upon

Upon this ſubject the following deciſions have been made:

In the caſe of *Barjeau* v. *Walmſley*, (*b*) which was an action of *indebitatus aſſumpſit* for money lent, it appeared that the plaintiff and defendant gamed together, at toſſing up for five guineas at a time: and the plaintiff having won all the defendant's ready money, lent him ten guineas at a time, and won it, till the defendant had borrowed one hundred and twenty guineas. Upon the trial it was contended that, by the ſtat. 9 *Ann.* c. 14. the plaintiff could not maintain this action, becauſe that ſtatute avoids all ſecurities entered into, or executed, for money knowingly lent and advanced to game with; and the borrowing on an agreement to pay is a ſecurity.

But *Lee*, Ch. J. held this was not a caſe within the act, for there is not the word *contract*, as in the ſtatute of uſury; and he ſaid, "the word *ſecurities*, as it ſtands in this act, muſt mean laſting liens upon the eſtate. The Parliament might think there would be no great harm in a parol contract, where the credit was not like to run high; and therefore confined the act to neither ſecurities." Wherefore the plaintiff obtained a verdict for 126*l.*

So, in the caſe of *Alimbrook* v. *Hall*, (*i*) which was alſo an action of *aſſumpſit* for money paid by the plaintiff for the defendant, at his inſtance and requeſt. The caſe was this; viz. the defendant having loſt a ſum of money above 10*l.* upon a bet at a horſe-race, requeſted the plaintiff to pay it for him, which he did. The defendant objected, that this money being loſt at gaming, and recoverable back again by the ſtat. 9 Ann. c. 14. no action would lie: but the court held that this was not a caſe within the ſtatute; for there is not the word *contract*, as in the ſtatute of uſury, and gave judgment for the plaintiff.

So, in the caſe of *Palmes Robinſon*, Eſq. *v. Ann Bland*, adminiſtrator of *John Bland*, Bart. (*k*) which was alſo an action of *aſſumpſit*; and the declaration contained three counts. The firſt count was upon a bill of exchange drawn at *Paris*, by the inteſtate, Sir *John Bland*, on the 31ſt of *Auguſt*, 1755, on himſelf in *England*, for the ſum of 672*l.* ſterling, payable to the order of the plaintiff, ten days after ſight, value received, and accepted by the ſaid Sir *John Bland*. The ſecond count was for 700*l.*, monies lent and

(*b*) 2 *Stra.* 1249. *See alſo* 1 *Bl. Rep.* 260. (*i*) 2 *Wilſ.* 309.
(*k*) 2 *Burr.* 1077.

advanced

advanced by the ſaid plaintiff to the ſaid Sir *John Bland*, at his requeſt. The third count was for 700*l.* monies had and received by the ſaid Sir *John Bland*, to and for the uſe of the plaintiff.

At the trial, a verdict was found for the plaintiff, damages 672*l.*; ſubject to the opinion of the court of *King's Bench*, on the following caſe which ſtated, "That the bill of exchange was given at *Paris* for 300*l.* there lent by the plaintiff to Sir *John Bland*, at the time and place of play; and for 372*l.* more loſt, at the ſame time and place, by Sir *John Bland*, to the plaintiff, at play; that the play was very fair; and there was not any imputation whatſoever on the plaintiff's behaviour; that there were ſeveral gentlemen and perſons of faſhion then and there at play beſides the plaintiff and Sir *John Bland*; that in *France*, money loſt at play, between gentlemen, may be recovered as a debt of honour before the marſhals of *France*, who can enforce obedience to their ſentences by impriſonment, though ſuch money is not recoverable in the ordinary courſe of juſtice; that money lent to play with, or at the time and place of play, may be recovered there, as a debt, in the ordinary courſe of juſtice, there being no poſitive law againſt it; that Sir *John Bland* was, and the plaintiff is a gentleman." The queſtion for the opinion of the court was, whether, under theſe circumſtances, the plaintiff was entitled to recover any thing, and what, againſt the defendant?

The court determined that the plaintiff could not recover upon the count on the bill of exchange, nor for the money won at play; but that he was entitled to recover on the ſecond count for the amount of the money lent.

Lord *Manſfield*, Ch. J. ſaid, "In the preſent caſe the facts ſtated ſcarce leave room for any queſtion; becauſe the law of *France* and of *England* is the ſame. The firſt queſtion is, whether the plaintiff is entitled to recover upon this bill of exchange, by force of the writing. The ſecond queſtion is, whether he is entitled to recover upon the original conſideration and contract, by the juſtice and equity of his caſe, excluſive of any aſſiſtance from the bill of exchange, and taking that to be a void ſecurity. As to the firſt queſtion, the defendant has objected that the conſideration of the bill of exchange is wholly money won and lent at play: therefore, by force of the writing, the plaintiff cannot, by the law of *England*, recover, ſuch ſecurity being utterly void; and, no

doubt, the law of *England* is ſo. There are three reaſons why the plaintiff cannot recover here upon this bill of exchange: firſt, the parties had a view to the laws of *England*. The law of the place can never be the rule where the tranſaction is entered into with an expreſs view to the law of another country, as the rule by which it is to be governed. *Huberi Prælectiones, Lib.* 1. *tit.* 3. *Pa.* 34. is clear and diſtinct: *Veruntamen*, &c. *locus in quo contractus*, &c. *potius conſiderand*, &c. *ſe obligavit.*" *Voet* ſpeaks to the ſame effect. Now here the payment is to be in *England*: it is an *Engliſh* ſecurity, and ſo intended by the parties. It has been argued very rightly that Sir *John Bland* could never be called upon abroad for payment of this bill till there had been a wilful default of payment in *England*. The bill was drawn by Sir *John Bland* on himſelf, in *England*, payable ten days after ſight. In every diſpoſition or contract, where the ſubject-matter relates locally to *England*, the law of *England* muſt govern, and muſt have been intended to govern. Thus, a conveyance, or will of land, a mortgage, a contract concerning ſtocks, muſt all be ſued upon in *England*; and the local nature of the thing requires them to be carried into execution according to the law here. The caſe does not leave room for a queſtion; for the law of both countries is the ſame. The conſideration of the bill of exchange might, in an action upon it, be gone into there, as well as here; and, as to the money won at play, it could not be recovered in any court of juſtice there, notwithſtanding the bill of exchange. This writing is, as a ſecurity, void (being for a gaming debt) both in *France* and in *England*, we may therefore lay the bill of exchange out of the caſe: it is very clear the plaintiff cannot recover upon that count."

"Then as to the other counts, for money had and received to the plaintiff's uſe, and for money lent and advanced to him. Conſider it diſtinctly, as to each part; the money won, and the money lent. Firſt, as to the money won. By the rule of the law of *England* no action can be maintained for it. To this it has been objected, that the contract was made in *France*: therefore *ex comitate*, the law of *France* muſt prevail, and be the rule of determination. I admit that there are many caſes where the law of the place of the tranſaction ſhall be the rule; and the law of *England* is as liberal in this reſpect as other laws are. This is a large field, and not neceſſary now to be gone into. The point that the defendant muſt reſt upon, in the preſent caſe, is this; the money was won in *France*; there-

fore it ought to be governed by the law of *France*; and it is recoverable there before the marſhals of *France*, who can enforce obedience to their ſentence. The parliament of *Paris* would pay no regard to their judgment, nor carry it into execution. The marſhals of *France* proceed perſonally againſt gentlemen, as to points of honour, with a view to prevent duelling. They could not have taken cognizance of the preſent matter. It was not within their juriſdiction: it was no breach of honour in *France*: for the money was payable in *England*; and Sir *John Bland* could not be ſaid to have forfeited his honour till the ten days were out, and till the money had been demanded in *England*, and payment refuſed there. Sir *John Bland* was actually dead in a very ſhort time after he gave the note. The marſhals of *France* can only proceed perſonally againſt the gentleman who loſes the money, but have no power over his eſtate or repreſentatives, after his death. Therefore, as to the money won, the contract is to be conſidered as void by the law of *France*, as well as by the law of *England*, which makes it unneceſſary to conſider how far the law of *France* ought to be regarded."—Next, as to the money lent. The ſenſe of the legiſlature ſeems to me to be agreeable to the caſes that have been cited. The act of 16 *Car.* II. c. 7. ſ. 3. does not meddle with money lent at play, but as to money (exceeding 100*l.*) loſt and not paid down at the time of loſing it, it ſays, "that the loſer ſhall not be compellable to make it good; "but the contract and contracts for the ſame, and for every "part thereof, and all ſecurities ſhall be utterly void," &c.—The words 'contract and contracts for the ſame,' are not in 9 *Ann*, and I dare ſay were deſignedly left out: it only ſays, "that all notes, bills, bonds, judgments, mortgages, or other ſe-"curities, &c. for money won or lent at play, ſhall be utterly "void, &c." Here the money was fairly lent, without any imputation whatſoever. Sir *John Bland*, the borrower of it, being in a foreign country, might very naturally have been diſtreſſed under his then ſituation amongſt foreigners, for want of having ready money, or knowing how to procure it: and it might be even a kind and generous, and commendable act to lend it to him at that time, to extricate him from his difficulties, as he was then circumſtanced. The jury have left it quite open to the court to determine whether any thing, and what, is recoverable. As to the money won, we think it cannot be recovered: as to the

money lent, the plaintiff is entitled to it, both by the law of *England* and by the law of *France*."

So, in the case of *Wettenhall* v. *Wood*, (*l*) which was an action of *indebitatus assumpsit* for money lent. The defence set up was, that the plaintiff kept a common gambling house; that the defendant being there at play with several other persons, and having lost all his money, applied to the plaintiff for the loan of some money, for the purpose of continuing the play, when the plaintiff lent him the sum for which the present action was brought.

Lord *Kenyon*, Ch. J. before whom the cause was tried, was clearly of opinion, "that this money was recoverable; for that the statute 9 *Ann.* c. 14. only avoided securities for money lent to play with, and did not extend to cases of mere loans, without any security taken. He therefore directed a verdict for the plaintiff."

(*l*) 1 *Esp. Rep.* 18. *Et vide* Alcinbrook v. Hall, *post*, 151.

CHAPTER III.

Of Money Paid.

WHERE a perſon has laid out and expended his own money for the uſe of another, at his requeſt, the law implies a promiſe of re-payment; and an action of *indebitatus aſſumpſit* will lie on ſuch implied promiſe. (*a*)

It is intended to conſider the ſubject of the preſent chapter under the following heads:

1. *Of Money Paid for Another Generally.*

2. *Of Money Paid for Another Voluntarily, &c.*

3. *Of Payment of Arrears of Rent, under a Diſtreſs made upon Goods which had been depoſited with the Tenant, in the Way of his Trade, for a Particular Purpoſe.*

4. *Of Money Paid upon Accommodation, and other Bills of Exchange, &c.*

5. *Of Money Paid by a Surety on Behalf of his Principal.*

6. *Of Money Paid by one of ſeveral Perſons upon a Joint Undertaking, or Liability, &c.*

7. *Of Contribution to Party Walls.*

8. *Of Money Paid by Attornies, Sheriffs, Gaolers, and others, in conſequence of ſome Neglect of Duty, &c.*

(*a*) 3 *Bl. Com.* 163. *Carth.* 446.

1. *Of Money Paid for Another Generally.*

If money be paid by *A.* to *B.* at the requeſt of *C.*, on account of *D.*, *A.* may maintain an action of *indebitatus aſſumpſit* againſt *C.* for ſo much money paid to his uſe.

Thus, in the caſe of *Harris* v. *Huntbatk*, (*b*) which was an action of *indebitatus aſſumpſit* for money paid, laid out, and expended by the plaintiff at the defendant's requeſt. At the trial the evidence was, that one *Davidſon* coming to the plaintiff, by the defendant's order, for money to pay workmen, the plaintiff refuſed to pay the money, unleſs the defendant would ſign a receipt. Whereupon the defendant wrote the following note; viz. "Mr. *Harris*, at the earneſt requeſt of the gardener, the workmen wanting money greatly, for the work at the wood houſes, this is to certify that it is my requeſt that you pay to Mr. *Davidſon*, on the account of Maſter *Hillier*, for the workmen's uſe, the ſum of 15*l.* As witneſs my hand. *S. Huntback.*" And a receipt was given by the ſaid *Davidſon*, the gardener, to the plaintiff, on the plaintiff's paying him this 15*l.* Verdict for the plaintiff, ſubject to the opinion of the Court of *King's Bench* upon this queſtion, viz. Whether the evidence was ſufficient to ſupport the verdict upon the count for money paid.

For the plaintiff it was argued, that he could not have maintained an action againſt Maſter *Hillier* for this money. The plaintiff refuſed to advance it till the defendant wrote the note in queſtion, which was an original undertaking that the defendant would pay the money abſolutely; and it was advanced on the credit of the defendant.

On the other ſide it was contended, that the note only amounted to a certificate that the money was proper to be paid; and therefore could not be conſidered as an original undertaking by the defendant to pay the money abſolutely.

The court, however, determined that the money was advanced on the credit of the defendant; and that the evidence was ſufficient to ſupport the verdict upon the count for money paid.

Lord *Mansfield*, Ch. J. ſaid, "This is clearly an original undertaking; and the jury have found this note to be ſufficient evi-

(*b*) 1 *Bur.* 373. et vide ante 138. *S. C. but on a different undertaking.*

dence

dence of the debt; and it is, indeed, a matter of *fact* rather than of *law.*"

So, if *A.* pays *B.* a ſum of money at the requeſt of *C.* in diſcharge of a gaming debt due from *C.* to *B.*, an action of *indebitatus aſſumpſit* lies by *A.* againſt *C.* for the money ſo paid.

Thus, in the caſe *Alcinbrook* v. *Hall*, (*c*) which was an action upon an *aſſumpſit* for money paid by the plaintiff, for the defendant, at his inſtance and requeſt. The caſe was this; viz. The defendant having loſt a ſum of money above 10*l.* upon a bet at a horſe-race, requeſted the plaintiff to pay it for him, which he did. The defendant objected, that this money being loſt at gaming, and recoverable back again by the ſtat. 9 *Ann.* c. 14. this action would not lie: but the court held this was not a caſe within the ſtatute; for there is not the word contract, as in the ſtatute of uſury. Stra. 1249. So the court held this was not a caſe within the ſtat. 9 *Ann*, and gave judgment for the plaintiff.

2. *Of Money Paid for Another Voluntarily, &c.*

No perſon can by a *voluntary payment* of the debt of another, make himſelf that man's creditor, and recover from him the amount of the debt ſo paid. (*d*)

So, where money is paid againſt the expreſs conſent of the party for whoſe uſe it is ſuppoſed to have been paid, no action will lie for the money ſo paid.

Thus, in the caſe of *Stokes* and another, overſeers of *St. Vedaſt*, otherwiſe *Foſter*, v. *Lewis* and another, overſeers of *St. Michael's Le Quern*, (*e*) which was an action for money paid, laid out, and expended, by the plaintiffs, to the uſe of the defendants; and the queſtion aroſe upon the payment of a ſexton's ſalary. At the trial before Lord *Manſfield*, Ch. J. it appeared, that by the act 22 and 23 *Car.* 2. c. 11. which was an additional act for rebuilding the city of *London* after the great fire, and uniting pariſhes, &c. amongſt others, the pariſhes of *St. Vedaſt's* and *St. Michael Le Quern* were united; and that, ſince that time, one ſet of officers had ſerved for the two pariſhes, the election of whom had always been made at a joint veſtry; that only nine vacancies in the office of

(*c*) 2 *Wilſ.* 309. (*d*) Per *Lord Kenyon*, 8 *Term Rep.* 613. *See alſo ſame Rep.* 310. (*e*) 1 *Term Rep.* 20.

ſexton had happened ſince, all of which had been filled up agreeably to this cuſtom; that, in the year 1759, the ſexton's ſalary was fixed at 20*l. per annum*, which was agreed to be paid equally by both pariſhes; that the overſeers of *St. Vedaſt's* had paid the ſexton who was laſt choſen the whole ſum; to recover a moiety of which this action was brought.

The defence ſet up was, that the laſt election of a ſexton was not a joint one; and that the pariſh of *St. Michael's* claimed a right of chooſing a ſeparate ſexton for themſelves; of which they had given notice to the other pariſh.

The court were of opinion that this action could not be maintained; and Lord *Mansfield*, Ch. J. ſaid, "The diſpute ariſes concerning the election of a ſexton, and the way of trying it is by refuſing to pay the ſexton elected; the whole is notoriouſly in litigation. Under theſe circumſtances, therefore, one pariſh paid the *quota* of the other in ſpite of their teeth: then, can it be ſaid that this action for money paid, laid out and expended, will lie? certainly not. This action muſt be grounded either on an *expreſs* or *implied* conſent: here is neither. Another ſtrong objection to this action is, that it is trying the right of the ſexton without his being a party to it."

3. *Of the Payment of Arrears of Rent under a Diſtreſs made upon Goods which had been depoſited with the Tenant, in the Way of his Trade, for a Particlar Purpoſe.*

The goods of *A.* on the premiſes of *B. C.* and *D.* were diſtrained by the landlord for rent in arrear; and *A.* was obliged to pay the rent to redeem them. It was held that *A.* might maintain an action of *aſſumpſit* for money paid to the uſe of *B. C.* and *D.* although the two latter had previouſly aſſigned their intereſt in the premiſes to *B.*

Thus, in the caſe of *Exall againſt Partridge* and two others, (*f*) which was an action upon promiſes for money paid, &c.: at the trial before Lord *Kenyon*, Ch. J. it appeared, in evidence, that the three defendants were leſſees of certain premiſes, by deed, from

(*f*) 8 *Term Rep.* 308. 3 *Eſp. Rep.* 8. *S. C.*

one

one *Welch*, to whom they thereby covenanted to pay the rent, and that two of the defendants afterwards, with the plaintiff's knowledge, aſſigned their intereſt to *Partridge*, the other co-leſſee, who was a coach-maker, ſubſequent to which aſſignment the plaintiff put his carriage upon the premiſes, under the care of *Partridge*, where it was taken as a diſtreſs by *Welch*, the landlord, for rent in arrear: and the plaintiff, in order to redeem it, was obliged to pay the rent due, taking, at the time, a receipt from *Welch's* attorney, as for ſo much received on account of the three defendants. The action was brought to recover that ſum; but the plaintiff was nonſuited, on the ground that the action ſhould have been brought againſt *Partridge* alone, he being the perſon in the ſole poſſeſſion of the premiſes at the time, with the knowledge of the plaintiff, who had truſted him only with the poſſeſſion of his property, and he alſo being the perſon ultimately reſponſible to the other two defendants; and therefore it was ſaid that the money muſt be taken to have been paid for his uſe only. However, upon a motion to ſet aſide this nonſuit, his lordſhip changed his opinion; and the court, upon argument, determined that the action was rightly brought againſt the three defendants, who were all liable by their covenant to pay the landlord the rent in queſtion.

Lawrence, J. ſaid, "This is not a caſe of a voluntary payment; for here was a diſtreſs for rent due from the three defendants; the notice of diſtreſs expreſſed the rent to be due from them all; the money was paid by the plaintiff in ſatisfaction of a demand on all; and it was paid by compulſion: therefore I am of opinion that this action may be maintained againſt the three defendants. The juſtice of the caſe, indeed, is, that the one, who muſt ultimately pay this money, ſhould alone be anſwerable here: but as all the three defendants were liable to the landlord for the rent in the firſt inſtance, and as by this payment, made by the plaintiff, all the three were releaſed from the demand of the rent, I think that this action may be ſupported againſt all of them."

4. *Of*

4. *Of Money Paid upon Accommodation or other Bills of Exchange, &c.*

If *A.* accepts a bill of exchange merely for the accommodation of *B.* and when it becomes due an action is brought thereon by the holder againſt *A.*, who defends it at the inſtance of *B.*, and the holder recovers the full value and coſts, which are afterwards paid by *A.*, the latter may maintain an action of *indebitatus aſſumpſit* againſt *B.* for the amount thereof, as for ſo much money paid, laid out, and expended to his uſe.

Thus, in the caſe of *Howes* v. *Martin*, (*g*) which was an action of *aſſumpſit* for money paid, laid out, and expended by the plaintiff, to the uſe of the defendant. Upon the trial theſe facts appeared in evidence: the plaintiff and defendant having lived in habits of intimacy, the plaintiff had been induced, out of motives of friendſhip, and merely to accommodate the defendant, to accept ſeveral bills of exchange on his account. Theſe bills had all been regularly taken up, when they became payable by the defendant, except the laſt, which was for 20*l.* This bill had come into the hands of one *Greenfill*, and the defendant being unable to take it up when due, had prevailed upon *Greenfill* to accept 16*l.* in part, and the plaintiff's acceptance for ſix guineas, being the balance of the bill, with the intereſt then due for the remainder. This bill for ſix guineas not being paid when due, *Greenfill* brought his action on it againſt *Howes*, the now plaintiff, as the acceptor. On the action being brought, the plaintiff acquainted *Martin* with the circumſtance, and he deſired the preſent plaintiff to defend the action, repreſenting to her, that, as ſhe had never received any conſideration for the acceptance, ſhe might ſafely do it. In conſequence of which repreſentation ſhe did defend the action, but *Greenfill*, the plaintiff in that action, obtained a verdict againſt her for the amount of the bill, which, with the coſts, amounted to 32*l.*; to recover which ſum this action was brought: but the counſel for the defendant objected that this caſe came within the ſtatute of frauds, 29 *Car.* II. c. 3. the object of the action being to recover from the defendant a ſum of money which was the debt and coſts in an action againſt the plaintiff herſelf, on her own acceptance, and which therefore was to be deemed her own

(*g*) 1 *Eſp. Rep.* 162.

debt;

debt; but as there was no note in writing the action was not maintainable.

Lord *Kenyon*, Ch. J. overruled this objection, and held that the case was not within the statute of frauds. His lordship said, "that, in this case, it appeared that the plaintiff never had any consideration whatever for the acceptances, which were given merely on the defendant's account, and for his use; that the defence to the action on the note was on his account, and from whence he could have derived a benefit; that as he therefore was personally interested, and directed the defence to be made, by which he might have been benefitted, that the money must be considered to have been laid out by the plaintiff on his account, and to his use; and that she therefore was entitled to recover it back from him."

So, where *A.* lent his acceptances to *B.* before his bankruptcy, but which were not paid till afterwards, *A.* may maintain an action against the defendant for *money paid to his use*, notwithstanding his bankruptcy and certificate, and notwithstanding the defendant, before his bankruptcy, gave his receipt to *A.* acknowledging the receipt of so much money as the acceptances amounted to.

Thus, in the case of *Snaith* and others, assignees of *Parke*, v. *Gale*, (*b*) which was an action of *assumpsit* for money paid, laid out, and expended; to which the defendant pleaded his bankruptcy. It appeared that *Parke* and *Gale* were both mahogany merchants; and that the former had accepted bills drawn on him by the latter, payable to his order, for his accommodation. The first of these bills was paid by *Parke*, before *Gale's* bankruptcy, and was therefore out of the question. The second was for 240*l.* dated 4th *January*, 1793, though in fact drawn on the 8th of *February*, payable four months after date, which became due on the 7th of *May*. The third was for 291*l.* 3*s.* dated 4th *February*, 1793, though in fact drawn the 2d of *April*, payable four months after date, and which became due 7th *June*. The first of these two last bills were taken up by *Parke*, between the time of *Gale's* bankruptcy, and the issuing of the commission against him; the last was taken up after the issuing of *Gale's* commission. *Gale* became a bankrupt on the 3d of *May*, 1793, previous to which,

(*b*) 7 *Term Rep.* 364.

and

and the agreement hereafter mentioned, he had negotiated theſe bills. On the 8th of *April*, 1793, an agreement under ſeal was entered into between *Parke* and *Gale*, as a collateral ſecurity to the former for his acceptances, whereby, in conſideration of 833*l.* 1*s.* (namely, the ſums contained in the ſaid three bills and intereſt) paid by *Parke* to *Gale*, the receipt of which *Gale* thereby acknowledged, the latter ſold and aſſigned over to *Parke* certain cargoes of mahogany, then expected to arrive from the Bay of *Honduras*, and conſigned to *Gale*: and *Gale* alſo covenanted, in caſe of loſs of the cargoes, to aſſign to *Parke* the policies of inſurance on the ſame; and at the ſame time *Gale* ſigned the following receipt thereon: "Received, the day and year within writ-"ten, of the within named *T. Parke*, 833*l.* 1*s.* being the pur-"chaſe-money within mentioned. *J. Gale.*" The cargoes arrived the beginning of *Auguſt*; but bills of exchange came tacked to the bills of lading, ſo that *Parke* could not avail himſelf of the conſignments without accepting thoſe bills, which not being deemed prudent to do, he relinquiſhed the conſignment to *Gale*, on his repreſentation that it would be no ſecurity. A verdict was taken for the plaintiffs, who were the aſſignees of *Parke*, who had alſo become bankrupt, for the amount of the two laſt bills paid by him after *Gale's* bankruptcy, with liberty to the defendant to move to ſet it aſide, if the debt were proveable under *Gale's* commiſſion, in conſequence of the agreement between the parties. A rule for this purpoſe was accordingly made in the Court of *King's Bench*; and, in ſupport of which it was argued, that the aſſignment and receipt were in the nature of ſecurities, and were an acknowledgment of a preſent debt, and therefore proveable under the commiſſion: and the caſes *ex parte*, *Maydwell* (*i*) and *Martin* v. *Court*, (*k*) were cited as deciding this point.

On the other ſide it was ſaid, that the caſes alluded to were caſes of croſs ſecurities, which made them differ from the preſent, where there was no legal ſecurity in the hands of *Parke*, which he could prove under the commiſſion. Neither the aſſignment, which failed all together, nor the receipt, could have been proved as a debt under the commiſſion. And of this opinion were the court; and the rule was accordingly diſcharged.

(*i*) *Co. Bankrupt Laws*, 157. (*k*) 2 *Term Rep.* 640.

Lord

Lord *Kenyon*, Ch. J. ſaid: "This differs from all the former caſes; for here was no debt due at law from the defendant to *Parke* at the time of the defendant's bankruptcy: but the debt altogether aroſe afterwards by the payment of the acceptances by *Parke*. No action could have been maintained at law on this acknowledgment: in the other caſes legal ſecurities were taken, upon which the party might have been ſued."

But, in the caſe of *Houle* v. *Baxter*, (*l*) which was alſo an action of *aſſumpſit* on promiſes; and the firſt count of the delaration ſtated that one *E. Capper* on 22d of *September*, 1796, drew a bill of exchange upon the defendant for 25*l.* payable at three months after date to *Capper*'s order, which *Capper* indorſed to the plaintiff, and the defendant accepted. The ſecond count, after ſetting out the bill and acceptance, and the indorſement by *Capper* to the plaintiff, further ſtated an indorſement and delivery of the bill to one *W. Abud*; a preſentment of it, when due, to the defendant for payment, and his refuſal; whereupon the plaintiff was obliged to pay *Abud* the money. There was alſo a count *for money paid*, &c. The defendant pleaded, that he became bankrupt on the 7th *November*, 1796. At the trial a verdict was found for the plaintiff, ſubject to the opinion of the Court of *King's Bench* on the following caſe: "The defendant, before his bankruptcy, kept a retail ſilverſmith's ſhop, and dealt with *Capper*, the drawer of the bill, who was a working ſilverſmith. On the 22d of *September*, 1796, the defendant ordered a parcel of goods of *Capper*, and in order to enable him to raiſe ſilver to make up ſuch goods the defendant accepted the bill of exchange mentioned in the declaration: *Capper* indorſed the bill; and the plaintiff, at *Capper*'s deſire, though without the defendant's privity, indorſed it likewiſe, receiving no value or conſideration whatever for ſo doing, but merely to give additional credit to the bill. The bill being thus drawn, accepted, and indorſed, *Capper* took it to one *Abud*, a refiner, who, on the credit of the bill, delivered to *Capper* a part of the amount in ſilver, and gave him the reſt in caſh. This ſilver was afterwards manufactured by *Capper* into the goods ordered by the defendant, which were accordingly delivered to him. The defendant became a bankrupt on the 7th of *November*, 1796, and afterwards obtained his cer-

(*l*) 3 *Eaſt Rep.* 177.

tificate.

tificate. On the 24th of *December*, 1796, being the day before the bill became due, the plaintiff went to *Abud*, and took it up, paying him the amount."

Groſe, J. delivered the opinion of the court as follows: "In this caſe the plaintiff contracted no liability at the defendant's requeſt. He never became ſurety for him in this tranſaction. His demand againſt the defendant, the acceptor, ariſes ſolely upon the bill, and there was nothing to prevent his proving it under the commiſſion. We are therefore of opinion that the defendant's bankruptcy is a bar to this action, and conſequently that there ought to be judgment for the defendant."

So, where *A.* and *B.*, for their mutual accommodation, exchange acceptances for acceptances, or bills of exchange for bills of exchange, for equal ſums, and both parties negotiate the bills; and after this tranſaction *A.* and *B.* both became bankrupts; and the eſtate of *A.* pays more upon *B.*'s acceptances than the eſtate of *B.* does upon *A.*'s acceptances; no action of *indebitatus aſſumpſit* will lie againſt *B.* upon an *implied* promiſe to pay the amount of the difference ſo paid by the aſſignees of *A.*; the remedy being upon the bills of exchange only, and proveable under the commiſſion of *B.*

Thus, in the caſe of *J. Cowley*, ſurviving aſſignee of *J.* and *A. Peters*, againſt *James Dunlop* and *R. Dunlop*, (*m*) which was an action of *aſſumpſit* brought by the plaintiff as ſurviving aſſignee of the eſtate and effects of *John Peters* and *Alexander Peters*, bankrupts, for *money paid, laid out and expended* by the plaintiff and one *John Neale*, (his co-aſſignee, deceaſed,) in the life-time of the ſaid *John Neale*, to and for the uſe of the defendants. There were alſo counts in the declaration for money *had and received*, and upon an *account ſtated*. The defendants ſeverally pleaded, that they had become bankrupts, that is to ſay, *James Dunlop* on the 7th *November*, 1785, and *Robert Dunlop*, on the 14th *December*, 1786, and that the ſeveral cauſes of action accrued before their reſpective bankruptcies. They alſo pleaded the ſtatute of limitations.

On the trial, before Lord *Kenyon*, Ch. J. the jury found a verdict for the plaintiff, damages 528*l.*, ſubject to the opinion of the Court of *King's Bench* on the following caſe:

(*m*) 7 *Term Rep.* 565.

"In

"In 1785 an exchange of bills to a very large amount took place between *J.* and *A. Peters*, linen drapers, and the defendants, merchants; and the ſeveral bills hereinafter mentioned to have been drawn by the defendants on Meſſrs. *Peters*, and by Meſſrs. *Peters* on the defendants, paſſed between the parties without any other conſideration being given for them by either of the parties than their mutual counter-acceptances. It was agreed that each party were to pay their own acceptances, which they reſpectively did, as long as they reſpectively continued ſolvent. In *November*, 1785, *J.* and *A. Peters* became bankrupts. In the ſame month the defendant *J. Dunlop* became bankrupt, and in the month of *December*, 1786, *R. Dunlop* alſo became a bankrupt, but they had been unable to pay their ſeveral acceptances for ſome time before the bankruptcy of Meſſrs. *Peters*. The bills drawn by the defendants on Meſſrs. *J.* and *A. Peters*, and accepted by them amounted to the ſum of 3000*l.* and upwards; part of thoſe acceptances was paid by Meſſrs. *Peters* before their bankruptcy, and the ſum of 1792*l.* 10*s.* 8*d.* on their outſtanding acceptances was proved under their commiſſion, and dividends paid thereon to the amount of 1224*l.* 18*s.* The bills drawn by Meſſrs. *Peters* on the defendants, and accepted by them amounted alſo to the ſum of 3000*l.* and upwards, and which remained unpaid at the time of the bankruptcy, both of the defendants and of Meſſrs. *Peters*, and upon which the eſtate of Meſſrs. *Peters* has paid dividends to the amount of 2211*l.* 15*s.* 10*d.* which payments of 1224*l.* 18*s.* and 2211*l.* 15*s.* 10*d.* by Meſſrs. *Peters* exceed the full amount of the acceptances they were to provide for by the ſum of 1644*l.* 3*s.* 2*d.* Moſt of the above mentioned bills were proved under the reſpective commiſſions againſt *J. Dunlop* and *R. Dunlop*, and all of theirs are ſtill proveable under the ſaid commiſſions. A dividend of 6*d.* in the pound has been made of the eſtate and effects of *J. Dunlop* under the commiſſion iſſued againſt him. The amount of the ſeveral dividends paid from the eſtate of Meſſrs. *Peters*, ſubſequent to the bankruptcy of the defendants, exceeds the amounts of their outſtanding acceptances by the ſum of 1644*l.* 3*s.* 2*d.*: but the amount of ſuch exceſs of dividends paid within the time of the ſtatute of limitations, giving credit for the dividend paid under the commiſſion againſt *J. Dunlop*, is the ſum of 528*l.* only, for which the verdict is taken. No final dividend has been declared under either of the three commiſſions of bankrupt, and all the bankrupts had ſeverally obtained their certificates before

before the commencement of this action. This ſum of 1644*l.* 3*s.* 2*d.* has been attempted to be proved under the commiſſion againſt the defendants, but the commiſſioners rejected the proof."

After this caſe had been twice argued at the bar, the judges, being divided in opinion, delivered their opinions *ſeriatim* as follow:

Lawrence, J. "Upon this caſe the tranſaction between the parties is ſhortly this. The *Peters* accepted bills to a large amount for the *Dunlops* in exchange for other bills accepted by the *Dunlops* to as large an amount for the *Peters*, which bills were negotiated by both the parties. The houſes of *Peters* and of *Dunlops* afterwards became bankrupt, in conſequence of which the aſſignees of the *Peters* were obliged to pay a dividend as drawers on the bills accepted by *Dunlops*, as well as to pay the bills accepted by the *Peters*; all which was done ſubſequent to the bankruptcy of the *Dunlops*: and the queſtion is, if the certificate of the *Dunlops* be a bar to the plaintiffs' claim; and I think that it is. In ſtating the reaſons that occur to me in ſupport of this opinion, I ſhall purſue the diviſion which Mr. *Gibbs* made in his argument, as I think the only means by which the rights of the parties can be clearly ſeen is by conſidering diſtinctly the different ſums paid by the *Peters*; and by this ſome of the difficulty, which ariſes from compounding payments depending on diſtinct contracts, will be done away.

If the plaintiffs recover, it muſt be either the money paid in diſcharge of the acceptances of the *Peters*, or of the bills drawn by them; and Mr. *Wood* in the courſe of the firſt argument contended that the *Peters* having lent the defendants their acceptances, no debt accrued till they paid them, and on that account the certificate was no bar, conceiving the plaintiffs' claim to be founded on paying the acceptances they had made to accommodate the defendants. But they are not, in my opinion, entitled to recover the money paid in diſcharge of the acceptances of the *Peters*, inaſmuch as in doing that that was only paid which the *Peters* engaged to do in conſideration of the *Dunlops* having given them their acceptances. The contract between the parties was, not that the *Dunlops* ſhould repay the money which might be paid in diſcharge of the *Peters*' acceptances, but that they would make themſelves liable by a ſimilar inſtrument to diſcharge the money ſecured by ſuch inſtrument; and a ſecurity for money, giving a remedy in caſe of non-payment, may well be a

conſideration of a ſimilar engagement. Had there been no conſideration the law would have implied a promiſe to repay: but no *implied promiſe* to repay can be raiſed where there is an *expreſs contract*, to which the party may reſort, the conſideration of which does not wholly fail. In *Touſſaint* v. *Martinnant*, (*n*) *Buller*, J. ſaid: "In ancient times no action could be maintained at law where a ſurety paid the debt of his principal; and the firſt caſe of the kind, in which the plaintiff ſucceeded, was before *Gould*, J. at *Dorcheſter*, which was decided on equitable grounds; now why does the law ariſe ſuch a promiſe? becauſe there is no ſecurity given by the party: but if the party chooſe to take a ſecurity, there is no occaſion for the law to raiſe a promiſe; promiſes in law only exiſt where there is no expreſs ſtipulation between the parties." And though an implied *aſſumpſit* may be raiſed in caſes of expreſs contracts, where the original contract is reſcinded, either by ſome event provided for by the original terms of the contract, by the ſubſequent agreement of the parties, or by the conſideration wholly failing, (in which laſt caſe where a ſum of money has been paid it may be recovered back in an action for money had and received,) yet if the contract be open, and the conſideration does not wholly fail, the expreſs contract of the parties muſt be reſorted to; and here the conſideration does not wholly fail, for recourſe has been had to the acceptances of the defendant, upon which the holders of the bills have received a dividend from their eſtate.

The fallacy of the argument, as applied to this queſtion, is the conſidering the *Peters* as lending their acceptances without any conſideration, without recollecting that the acceptances of the *Dunlops* was the conſideration of the acceptances of the *Peters*; and that ſuch is a good conſideration is laid down in *Rolfe* v. *Caſlon*, 2 *H. Bl. Rep.* 570. That was an action brought by the drawer of a bill of exchange againſt the acceptor: the facts of the caſe were theſe: The plaintiff and defendant being deſirous of accommodating each other, the plaintiff drew a bill on the defendant, payable to his order, which the defendant accepted, and the defendant drew on the plaintiff for preciſely the ſame ſum, payable to his order, which the plaintiff accepted, and neither had effects of the other in his hands. The queſtion

(*n*) 2 *Term Rep.* 105. et vide poſt 181.

was, if the defendants' acceptanee created a debt, which the plaintiff could prove under the commiſſion; and the court was of opinion, "That the two bills were mutual engagements, conſtituting a debt on each part, the one being a conſideration for the other; that the bill in queſtion was not given as an indemnity, which was in its nature conditional, but created an abſolute debt from the beginning capable of being proved under the commiſſion, and barred by the certificate." And this caſe is an anſwer to Mr. *Wood*'s propoſition, that there was no legal debt until the acceptances were paid. For theſe reaſons the plaintiff is not entitled to recover the amount of the acceptances of the *Peters*.

Nor can the plaintiff recover the money paid in diſcharge of the bills drawn by the *Peters*, though the bills ought to have been paid by the *Dunlops*, inaſmuch as this payment aroſe out of a tranſaction conſtituting a debt payable *in futuro* anterior to the bankruptcy of the *Dunlops*. The conſideration of the *Dunlops*' bills is the bills of the *Peters*', and the queſtion will be juſt the ſame as if the conſideration, inſtead of bills, had been goods ſold, or money lent to the *Dunlops*, and the ground on which the claim of the *Peters* againſt them is founded is that of the drawers of the bills of exchange, of which the *Dunlops* were the acceptors. If the *Peters* had never negotiated theſe bills, there can be no doubt but that they might have proved them under the commiſſion againſt the *Dunlops*; and the circumſtance of the *Peters* having negotiated the bills will make no difference, for the ſituation of the *Peters* is not worſe than it would have been if they had not parted with the bills. For if the indorſees had returned the bills to the *Peters*, they would have ſtood juſt in the ſame ſituation as if they had never parted with them, and they might then have proved them under *Dunlops*' commiſſion; and that they would have been entitled ſo to do, though they had not the bills at the time of the bankruptcy of the *Dunlops*, appears by the determination of Lord *Thurlow* in the caſe *ex parte Brymer*, reported in Co. Bkpt. Laws, 164. 4th ed. There one *Forſyth* having drawn bills on *Wilkins*, payable to the order of *Span*, who indorſed them over, *Wilkins* became a bankrupt, and afterwards *Span*, as indorſer, was obliged to take them up, and having been admitted a creditor under *Wilkins*' commiſſion, on a petition to expunge the proof of the debt, Lord *Thurlow* was of opinion, that the debt was provable by *Span*, and he diſmiſſed

diſmiſſed the petition, and continued of the ſame opinion on a rehearing. And the ſame was holden in the caſe *ex parte Seddon* by Lord *Laughborough*, Chancellor, 26th *November*, 1796. *Seddon* and others, the petitioners, having a bill of exchange accepted by one *Oldham*, indorſed it and delivered it to the bankrupts in conſideration of their promiſſory note for the ſame ſum, which note they indorſed to *Down* and Co. bankers; *Paty* and Co. the bankrupts negotiated *Oldham*'s bills, which he paid, and after the bankruptcy of *Paty* and Co. the petitioners, as indorſers of the bankrupts' note, were obliged to pay it to *Down* and Co.; and the *Chancellor* ordered that the petitioners ſhould be admitted creditors under the commiſſion for this note. And that it is not neceſſary that ſuch creditor ſhould be in poſſeſſion of the note at the time of the bankruptcy, further appears from the caſe of *Bingley* and *Maddiſon*, *M.* 1783, *Co.* Bkpt. Laws, 22. where it was holden that the indorſee of a note, after the bankruptcy, was a good petitioning creditor. Thus it would have been if the bills had been negotiated and returned without the indorſees proving them. And the indorſees proving the bills under the commiſſion will not make any difference, for having done that they can only call on the *Peters* for the deficiency beyond the dividend paid by the *Dunlops*, which is juſt what the *Peters* would looſe if they had kept the bills and proved themſelves, in which caſe the certificate would have barred them. Their negotiation of the bills ſubſtituted others in their place, with reſpect to their claims on the *Dunlops*, but did not enlarge thoſe claims. While the indorſees are holders of the bills, the *Peters* have no claim whatever on the *Dunlops*, they have transferred their right to others; and when the bills ſhall be returned, upon their taking them up, it will be juſt as if they had never parted with them, for the right to recover on the bills is not done away by negotiating them. If it were, much of the ſecurity, which a bill holder has, would be loſt by negotiation; for if *A.* ſhould indorſe to *B.*, and *B.* to *C.*, and *C.* to *D.*, and *D.* ſhould return the bill to *C.*, though he poſſibly might recover againſt *B.* on the original conſideration on which the bill was transferred to him, yet I do not ſee what action *C.* could have againſt *A.*, or the drawer but on the bill. That the right to ſue on the bill is not loſt by the indorſement is ſettled in the caſe of *Death* v. *Serwanters*, 1 *Lutw.* 886. That was an action by the ſecond indorſee againſt the acceptor; and the declaration ſtated the cuſtom

of merchants to draw bills of exchange, and to indorſe them, and that if the acceptor fail paying the bill to an indorſee, then, by the cuſtom, if the immediate previous indorſer pay the money, the acceptor is liable to the pay the money to that indorſer, as he would have been if he had not made any indorſement; judgment was given for the plaintiff, and affirmed in error in the *Exchequer-chamber*, where it was objected that by this means the acceptor would be liable to the payee, and all the indorſers, and ſo be charged ſeveral times: but this was not allowed; for by the indorſement of the payee he was diſcharged from any payment to him, and by the indorſement of the plaintiff from any payment to him, till he was again entitled to receive it by payment of the money to the indorſee. Now as, according to this caſe, the indorſer who pays is to be conſidered as having never made any indorſement, if he could likewiſe inſiſt on his having laid out money for the uſe of the acceptor, it would be in his power either to come in under the commiſſion or not, as he pleaſed; and his debt, at the ſame time, might be conſidered as ariſing both before and after the bankruptcy. If the indorſer who pays the whole cannot ſue for the whole, after the acceptor's certificate, he cannot be in a better ſituation by paying a part only inſtead of taking up the bill. This is an anſwer to Mr. *Wood*'s and Mr. *Erſkine*'s argument of their not having the bills.

But it has been contended, that after the negotiation of the bills, it was a matter of contingency whether the *Peters* would or would not be ever called on to pay, and that on payment a new debt aroſe, as in the caſe of principal and ſurety. But this caſe is diſtinguiſhable from that of a ſurety, who pays money for his principal after his bankruptcy; for the contract, in ſuch a caſe, is from its nature conditional, and it is a matter of uncertainty and contingency whether, at any time, any claim will ariſe on the principal. But that is not the caſe of the drawer of a bill, who may, after he has negotiated it, and been obliged to pay it, maintain an action, or ſue out a commiſſion on the bill itſelf, juſt as if he had never parted with it. When he takes up the bill he is referred back to his original contract, according to the caſe of *Death* v. *Serwonters*; until the bill gets back to the drawer, the acceptor is diſcharged, with reſpect to the drawer; when the drawer gets back the bill, his right revives, and the bill, which is the evidence of the contract of the acceptor,

proves that his undertaking was to pay a certain ſum of money at a fixed time, and not on any contingency. In ſhort, the queſtion comes to this, whether the drawer of a bill of exchange, who is obliged to take it up, after having negotiated it, is not confined to his action on the bill to recover againſt the acceptor? And it ſeems to me, that he is, for I ſee no reaſon to raiſe an *implied aſſumpſit*, as for money paid by the drawer for the acceptor, when the contract ariſing out of the bill and the cuſtom are fully ſufficient to enable him to recover what he may be obliged to pay on the acceptor's refuſal.

In addition to theſe reaſons it appears to me that a contrary doctrine would militate againſt the deſign of the bankrupt laws, which is to ſet fair traders free from the engagements they may have made previous to their bankruptcies; and that it will be very miſchievous if conſiderable dealers in trade, whoſe bills are in a ſtate of negotiation, at the time of their bankruptcies, ſhould be liable to the utmoſt amount of their bills, after having given up all their effects. Surely it cannot depend on the negotiation on non-negotiation of a bill by the payee, whether a debt created anterior to a bankruptcy ſhall or ſhall not be barred by it. The caſes which preſs upon this opinion of mine are thoſe of *Howis* v. *Wiggins*, (o) and *Brooks* v. *Rogers*. (p) With reſpect to the laſt Lord *Loughborough*, who was chief juſtice when that caſe was decided, on further conſideration, and of the caſes which had not been mentioned in the courſe of that argument, held differently in the caſe *ex parte Seddon*, which undoubtedly leſſens the force of it. I argued that caſe as being the caſe of principal and ſurety, and conſidered *Brooks* as lending his name to *Rogers* to get money on the draft of *Rogers* of the *Olney* bank, and that in ſubſtance it was an advance of money to *Rogers* on the credit of *Brooks'* name, as a ſurety to the bank: but I doubt if that argument is not fallacious, for on *Brooks'* carrying the letter to the bank, the banker lent him the amount of it upon the ſecurity of the bill and of his name, and when *Rogers* received the money, it was a loan to him by *Brooks* on the ſecurity of the bill, on which *Brooks* was entitled to recover when returned to him for non-payment. As to the caſe of *Howis* v. *Wiggins*, I ſenſibly feel the preſſure of it, and with the weight of ſuch an authority againſt me, I cannot but be apprehenſive

(o) 4 *Term Rep.* 714. (p) 1 *H. Bl.* 640.

that I have proceeded upon falſe grounds. I have endeavoured to diſcover wherein I may be miſtaken but without ſucceſs, and according to the beſt judgment I have been able to form, after much conſideration, the certificates, in this caſe, are bars to the demands. And the anſwer I give to the queſtions propoſed is, that the plaintiff is not entitled to recover, and that a verdict muſt be entered for the defendants."

Groſe, J. "The right of the plaintiffs depends upon the queſtion, whether the certificate of the defendants is a bar to the action; in other words, whether the debt on the bills accepted by the defendants could be proved by the plaintiffs under the commiſſion againſt the defendants. To make the caſe more intelligible, I will ſimplify it, and ſuppoſe it to be a caſe on two bills accepted and exchanged between *A.* and *B.*: it will then ſtand thus, *A.* exchanges his acceptance for 3000*l.* with *B.* for a like acceptance; *A.* pays his own acceptance; *B.* becomes a bankrupt, and cannot pay his, in conſequence of which the bill holder calls on *A.*, the drawer, and he pays that which *B.*'s eſtate could not pay. What then is the ſituation of the parties? *A.*, in paying his own acceptance has only performed his own engagement, and paid what he was bound to pay: but upon *B.*'s acceptance, on which he was the drawer, he is a creditor on the eſtate of *B.*; *B.*, the acceptor, was bound to pay him upon the bill; his right of action ariſes upon the bill, and not upon any contract collateral to the bill. If there had been no bankruptcy, and *A.* had in default of *B.* paid *B.*'s acceptances, *A.* might have ſued *B.*, as acceptor on the bill; and upon the eſtate of *B.*, as acceptor of the bill, he had a right to prove the money he had paid as drawer. To this purpoſe is the caſe of *Rolfe* v. *Caſſon*, * where *A.* drew a bill of exchange on *B.*, payable to the order of *A.* which *B.* accepted; and *B.* drew a bill on *A.*, payable to the order of *B.* which *A.* accepted for their mutual accommodation, both bills being made payable at the ſame time, having the ſame dates, and containing the ſame ſums. There it was holden, that the one acceptance was a good conſideration for the other, and not merely an indemnity; ſo that if either party became a bankrupt the bill accepted by him might be proved under his commiſſion; and that conſequently to an action brought on ſuch bill his bankruptcy and certificate might be pleaded in bar. Now apply

* 2 *H. Bl.* 570.

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the doctrine in that case to the present, and will stand thus; the bills accepted by the *Dunlops* were a good consideration for the bills accepted by the house of *Peters*; the *Dunlops* having become bankrupts, the bills accepted by them might have been proved under their commission; and, consequently, to an action brought on them, the certificate of the defendants may be pleaded in bar. The argument set up by the plaintiffs is, that the right of the *Peters* does not arise on the bills: but the fact is not so; the whole transaction is founded on the bills. The debt from the defendants, to the house of *Peters*, does not arise from the latter having paid their own acceptances, for those they were bound to pay; but from the defendants having omitted to pay their acceptances, in consequence of which the house of *Peters* were bound to pay as drawers, and are by law remitted to their right to recover against the *Dunlops* as acceptors. This is the true foundation on which the house of *Peters* could have any right to recover against the *Dunlops*; and to this effect is the case of *Death* v. *Serwonters* (q) So here the *Dunlops* not having paid their acceptances to the holders, the drawers were obliged to pay them; and when they have paid, they become again entitled; and the *Dunlops* are again liable. In other words, the house of *Peters* are remitted to their right on the bills, which, when in the hands of other holders, was suspended as to them."

Ashhurst, J. "The question is, whether, at the time of the bankruptcy of the *Dunlops*, that sum was or was not a debt proveable under their commission? and, according as this is decided, the consequence will follow of course, whether the debt is or is not barred by the bankruptcy or certificate. It is a general rule of law, that where one man pays a debt for another, which he was liable to pay, that is money paid for his use, and gives a new cause of action to the party so paying. The question is, whether this case comes within that rule. Here there was no other consideration than the mutual acceptances, and it was part of the original agreement that each was to pay his own. Then, taking that to be the transaction, there could not be said to be any debt existing, by or from either party provided they had kept to their several stipulations, and had each paid their own acceptances; consequently no debt could arise but by future failure of the parties. And it is laid down in *Chilton* v. *Whiffin*, (r) that no debt can be barred but what was contracted

(q) 1 *Lutw.* 835 *to* 888. (r) 3 *Wilf.* 17.

with certainty before the act of bankruptcy. This case seems to me to be the same in effect with that of *Young* and another v. *Hockley*. (s) There the defendant drew a bill of exchange on the plaintiffs, payable to his own order. The plaintiff, at the defendant's request, and on his promise to indemnify them, accepted the bill, which becoming due after the defendant's bankruptcy, the plaintiffs paid it to prevent being sued; and it was holden that they could not prove this as a debt under the commission, and therefore that the defendant could not plead his certificate in bar of the action on the promise to indemnify.

The case also of *Taylor* v. *Mills* and another, (t) seems very apposite to the present, where it was holden that a surety in a bond who pays the debt, after a commission of bankrupt issued against his principal, is not barred by the certificate, though the penalty of the bond was forfeited before. And Lord *Mansfield* said, that at the time of the bankruptcy, the defendants were not indebted to *Taylor*; he clearly, therefore, could not come in as a creditor under the commission; he was not damnified at that time; and till damnified, which he could not be till he had been called upon and had paid, he could not bring an action. He said, further, that the case did not seem to him to be different from any where the cause of action, though it arise after the bankruptcy, is founded on a pre-existing ground; and the other judges were of the same opinion. The cases of *Chilton* v. *Whiffin*, (u) and *Vanderheyden* v. *De Paiba* (v) which are not denied to be law, affirm the same principle; and so does the case of *Howis* v. *Wiggins*.* Now here the debt could never arise but by the failure of one of the parties to fulfil this engagement; and that did not happen till after the bankruptcy of the *Dunlops*, till when the debt was not ascertained.

This case, therefore, seems to fall exactly within the principle laid down by Lord *Mansfield*, in *Taylor* v. *Mills*. It is the common case where the cause of action arises after the bankruptcy, though founded on a pre-existing ground; and therefore this demand could not legally be proved under the *Dunlop's* commission. Indeed, it is stated as a fact in the case, that the commissioners rejected the proof; and I think they did right; because, at the time of the bankruptcy of the *Dunlops*, the estate of the *Peter's* had not paid nor ascertained the debt due from the *Dunlops*, which they

(s) 3 *Wilf.* 34[illegible] (t) *Cowp.* 525. *Et vide post.*
(u) 3 *Wilf.* 17[illegible] (v) *Ib.* 528. * 4 *Term Rep.* 714.

were

were afterwards obliged to do, in conſequence of the *Dunlops'* not paying their acceptances, agreeably to their undertaking: and if, at the time of the bankruptcy of the *Dunlops*, there was not ſuch a debt aſcertained as was proveable under the commiſſion, but it only aroſe afterwards upon a contingency, it will conſequently not be barred by the certificate; and therefore I am of opinion that the poſtea ſhould be delivered to the plaintiff."

Lord *Kenyon*, Ch. J. "The way in which I have conſidered this queſtion, leads me to draw the ſame concluſion that my brother *Aſhhurſt* has drawn, without encountering any deciſion. When theſe bills were drawn and accepted, they conſtituted an obligation on the acceptors, by which they were primarily liable to pay the perſon who ſhould have a title to the bills, and be in a condition to call for payment of the money: but they only conſtituted an obligation to the amount of the ſums contained in the bills; as ſoon as they had paid that money, they the acceptors, (the principal debtors) were diſcharged from every obligation. The holder of the bills tacitly engaged, firſt to apply to the acceptors for payment, and, on their failure, only to reſort to the drawers or indorſers. I lay out of my conſideration the caſes *ex parte Brymer*, and *ex parte Seddon*, becauſe they only ſhow that, though the indorſer of a bill of exchange was not in poſſeſſion of the bill at the time of the bankruptcy, yet if he gets poſſeſſion under a perſon who had a legal title to it, he may come in and prove his debt under the commiſſion: he is then (as my brother *Groſe* obſerved) remitted to his former title: but I yield to that propoſition with this qualification, that he has a right to call on the acceptor for payment, if the acceptor has not been called on by ſome perſon who had a better right to require payment; for if the acceptor has paid, he is delivered from all reſponſibility, and cannot be again called upon to pay the bill. Then let us conſider what the preſent caſe is: the holders of theſe bills have made uſe of them up to their extent, and proved them under the commiſſions againſt the *Dunlops*, the acceptors; and, after the eſtate of the *Dunlops* has been called upon to pay dividends up to the extent of theſe bills, ſhall it be permitted to another perſon, who gets poſſeſſion of the bills, to come upon the eſtate of the *Dunlops* again? That would be charging the eſtate of the *Dunlops* twice for the ſame debt. Proving the debt under the commiſſions againſt the *Dunlops*, and receiving a dividend, was equivalent to payment. If that be ſo, there is an end of the queſtion beyond all doubt;

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for here the holders, having a legal right to the bills, obtained ſatisfaction from the eſtate of the *Dunlops*, not indeed in monies numbered, but ſuch a ſatisfaction as the law has pointed out in this caſe. The acceptors were then delivered from all liability under the bills. But then aroſe another liability, in conſequence of the *Peters* having become ſureties for the acceptors; when the drawers paid the bills, they had a right to call on the acceptors, for whoſe uſe they had paid that money, as for ſo much money paid, laid out, and expended for their uſe. I before ſtated, and on that I rely, that when the ſecurity of a bill is given, the acceptor is the principal debtor: to him the holder muſt firſt apply, and, on his failure, the holder may have recourſe to the drawer: but here, down to the time of the bankruptcy of the defendants, it was impoſſible for the houſe of *Peter's* to call on the eſtate of the *Dunlops* for payment. If the bills, though once negotiated, had come back again to the *Peter's*, they would have been remitted to their better right, and might have proved their right under the commiſſions againſt the *Dunlops*: but as the bills were not in the hands of the *Peter's* at that time, and were put in force againſt the eſtate of the *Dunlops* by the perſons who had the legal right to them, the *Peters* could not prove theſe bills again under the ſame commiſſion. Whether or not the *Peters* could have proved theſe bills under the *Dunlop's* commiſſion, will be ſeen by conſidering, whether or not they could have maintained an action at law againſt the *Dunlops*, before the bankruptcy. Had ſuch an action been brought, it would have been an anſwer to it to have ſhown that the bills had been already paid by the *Dunlops*. The eſtate of the *Dunlops* having once paid theſe bills, I cannot conceive how the *Dunlops* could be again liable on the bills; and yet the affirmative of that propoſition muſt be eſtabliſhed before any fair oppoſition can be made to the preſent action. As it is clear that the *Peters* could not have brought any action againſt the *Dunlops* on theſe bills before the bankruptcy, it ſeems to follow that, having been called upon after the bankruptcy of the *Dunlops* to pay this money, which the *Dunlops* were bound to pay, the right of action accrued to the *Peters* only on payment after the bankruptcy, on the ſame ground that a ſurety, who pays money for his principal, after his bankruptcy, may ſue the principal, and the debt is not barred by the bankruptcy and certificate of the principal.

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I am therefore of opinion, that the plaintiff is entitled to judgment; but, as the court are equally divided, no judgment can be given in this caſe."

But in the caſe of *Buckler* v. *Buttivant* and *White*, (w) this queſtion was finally ſettled, againſt the opinions of Lord *Kenyon* and Mr. Juſtice *Aſhhurſt*. It was an action to recover 49*l.* 15*s.* 2*d.* for ſo much money paid, laid out, and expended by the plaintiff to the uſe of the defendant; to which the defendant, *Buttivant*, pleaded, firſt, *non-aſſumpſit*; 2dly, that, before the exhibiting the plaintiff's bill, viz. on the 1ſt *October*, 1799, he, the defendant, became a bankrupt; and that the ſeveral cauſe of action accrued before his bankruptcy. The other defendant, *White*, ſuffered judgment by default. At the trial, a verdict was found for the plaintiff for 49*l.* 15*s.* 2*d.* ſubject to the opinion of the Court of *King's Bench*, on the following caſe: "The defendants were in partnerſhip, under the firm of *Buttivant* and *White*, at the time of writing the ſeveral letters, and drawing and accepting the bills of exchange hereinafter mentioned: and *White*, at the ſame time, carried on another buſineſs, under the firm of *White* and Co. diſtinct and ſeparate from his co-partnerſhip with *Buttivant*. The five letters (copies of which are annexed to the caſe) were written by *White* to the plaintiff, and contained the five following bills of exchange: (1ſt.) "*Norwich*, *July* 22d, 1799. Three months "after date, pay to our order 61*l.* 7*s.* 6*d.* value received, as ad-"viſed." (Signed) "*T. Buttivant* and *W. White*," (and ad-"dreſſed) to Mr. *John Henderſon*, *Michael's Alley*, *Cornhill*, *Lon-"don*," and "accepted, *John Henderſon*," and indorſed by the defendants. (2d.) "*Norwich*, *Auguſt* 31, 1799. "Two "months after date pay to the order of Meſſrs. *W. White* and "Co. 143*l.* 14*s.* value received, as adviſed." (Signed) *T. Butti-"vant* and *W. White*," (and addreſſed to and) "accepted "*John "Henderſon*," (and indorſed) "*W. White* and Co." (3d.) This was the ſame as the laſt, only for 117*l.* 13*s.* (4th.) "*Nor-"wich*, *Auguſt* 3d, 1799. Three months after date pay to our "order 88*l.* 15*s.* value received, as adviſed." (Signed) "*T. Butti-"vant* and *W. White*." (Addreſſed) "To Mr. *Wm. Wells*, "*Princes Street*, *Leiceſter Fields*, *London*," (and) "accepted "*Wm. Wells*," (and indorſed by the defendants.) (5th.) "*Nor-"wich*, *September* 9th, 1799. Two months after date pay Meſſrs.

(w) 3 *Eaſt Rep.* 72.

W. White

" *W. White* and Co. or order 153*l.* 17*s.* 8*d.* value received, as " adviſed." (Signed.) " *T. Buttivant* and *W. White.*" (And addreſſed to and) " accepted *John Henderſon.*" (And indorſed) " *W. White* and Co."

The plaintiff accepted the four following bills of exchange, one dated " *Norwich, July* 22d, 1799. Three months after date pay " to our order 61*l.* 7*s.* 6*d.* value received, as adviſed." (Signed) " *T. Buttivant* and *W. White.*" (And addreſſed to the plaintiff, and indorſed by the defendants,) and the three others all drawn by " *W. White* and Co." from *Norwich*, at two months after date, payable to their own order, and indorſed by them; the firſt directed " *September* 3d, 1799," for " 261*l.* 7*s.*" the next *Sept.* 5th, " 1799," for " 88*l.* 15*s.*" and the laſt dated " *Sept.* 10th, 1799," for " 154*l.* 3*s.*

The four laſt mentioned bills were accepted by the plaintiff, for and on account of the defendants, without his having received any conſideration for the ſame, other than the before-mentioned five bills, contained in the letters hereunto annexed. On the 1ſt *October*, 1799, the defendants became bankrupts; and *Buttivant* has ſince obtained his certificate. At the time of ſuing out the commiſſion, and before the plaintiff had proved any debt under it, the plaintiff had paid to the holders of the four bills which he had accepted, 515*l.* 17*s.* 8*d.* on account; which ſum, together with the further ſum of 197*l.* 8*s.* 8*d.* due and owing from the defendants to the plaintiff, upon another account, making in the whole the ſum of 713*l.* 6*s.* the plaintiff proved under the commiſſion. After the ſuing out the commiſſion, and proof of the above ſum of 713*l.* 6*s.* under it, the plaintiff paid the balance of his acceptances of the four bills to the holders thereof, amounting to the ſum of 49*l.* 15*s.* 2*d.* for which the preſent action was brought. The five firſt-mentioned bills, drawn and ſent by the defendants to the plaintiff, were duly preſented, and returned for non-payment; and the ſame are ſtill wholly unpaid. But the plaintiff has received a dividend on the above ſum of 713*l.* 6*s.* ſo proved as aforeſaid. The queſtion for the opinion of the Court was, whether the plaintiff were entitled to recover the ſaid ſum of 49*l.* 15*s.* 2*d.*? If not, a verdict to be entered for the defendant, *Buttivant.*

The letters referred to in the caſe, all of which were written from the defendants to the plaintiff, were as follows:

" *Norwich*,

" *Norwich, Auguſt* 6th, 1799. We duly received your favour, " requeſting a renewal of the tranſaction, through Meſſrs. *Schnie-* " *der* and Co. Agreeable thereto we now incloſe

£ 139	6	0	*Schnieder* and Co.	*Auguſt* 6,	2 months.
159	13	0			
61	7	6	*Henderſon,*	*July* 22,	3 months.

£ 360 6 6 to which you will procure acceptances, and credit us againſt the following drafts we value on you:

£ 298	19	0	6th *July,*	3 months.
61	7	6	22d *July,*	3 months.

£ 360 6 6 to which we requeſt your protection; and when at maturity will finiſh the tranſaction," &c.

" *Norwich, Auguſt* 31ſt, 1799.—Obſerving the drafts we remitted you on Mr. *Henderſon* will be due in a few days, we have taken the liberty to incloſe two more, to which we beg you will be pleaſed to procure acceptances; and at the ſame time we take the liberty to value on you the amount in one draft for the ſame ſum, at two months from the ſecond inſtant, *September,* to which we ſhall conſider ourſelves much obliged by your ſhowing the uſual protection, relying on any ſimilar ſervice in our power is at all times at your command," &c.

" *Norwich, Sept.* 5, 1799.—We took the liberty, a few poſts back, to incloſe drafts on Mr. *Henderſon.* Not hearing from you, we preſume the ſame are duly at hand, and ends the tranſaction. We herewith beg to incloſe a draft for 88*l.* 15*s.* on *W. Wells,* 3d of *Auguſt,* 3 months. We adviſe ſaid friend it lays in your hands, and have requeſted him to call and ſhow honour to the bill, there being a difference off, on *Saturday,* for which he has the neceſſary. We take the liberty to value on you the ſame amount, at two months from this day, requeſting the favour you will notice the ſame on its appearance," &c.

" P. S. We obſerve on the 12th you will have paid a draft, 135*l.* 14*s.* on *T. Henderſon*; pray ſend anſwer."

" *Norwich, Sept.* 9th, 1799. We have duly your favour of the 6th inſtant, wherein we note your abſence from home; but as we preſume this will meet you, we take the liberty to remit you a draft for 153*l.* 17*s.* 8*d.* on Mr. *T. Henderſon,* at two months, which we ſhall eſteem it a favour you will have accepted; and as we hope it will not be attended with inconvenience to you, we

take

take the liberty to value on you the amount in a draft, the 10th inſtant, at two months, for 154*l.* 3*s.*; to which we beg your acceptance; and at maturity will finiſh the tranſaction, except 5*s.* 4*d.* which we beg our friend, Mr. *Wells*, to pay you," &c.

There was alſo another letter from the defendants to the plaintiff, dated "*Norwich*, *Sept.* 19th, 1799," the purport of which was to inform him of their bankruptcy and diſtreſs; and hoping that the circumſtance might not be attended with any fatal conſequence to him, &c.

The Bill Account ſtood thus between the Parties:

Bills drawn by the Defendants, and accepted by their Agents, *J. Henderſon* or *W. Wells*.				Bills drawn by Defendants, and accepted by plaintiff.			
Sums.			Time when due.	Sums.			Time when due.
£.	*s.*	*d.*		*£.*	*s.*	*d.*	
61	7	6	25th *Oct.* 1799.	61	7	6	25th *Oct.* 1799.
143	14	0	3d *Nov.*	261	7	0	5th *Nov.*
117	13	0	3d *Nov.*				
88	15	6	6th *Nov.*	88	15	0	8th *Nov.*
153	17	8	13th *Nov.*	154	3	0	13th *Nov.*
565	7	2		565	12	6	
				Balance	0	5	4

The court determined that the tranſaction was an *abſolute exchange of ſecurities*, and that each party was confined to his remedy on thoſe ſecurities, and that the law would not raiſe an implied promiſe by the defendants to repay to the plaintiff the amount on the balance of his acceptances paid after the bankruptcy.

Lord *Ellenborough*, Ch. J. ſaid, "The queſtion principally is, in what relation theſe parties ſtood to each other, whether in that of principal and agent, of which I ſee no evidence, or whether the tranſaction between them was not a downright exchange of paper, for the mutual accommodation of the parties, an exchange of acceptances of the plaintiff for acceptances of the defendant, given in the name of their agent, of equivalent, or what was conſidered as equivalent amount, the difference being only a ſmall ſum of 5*s.* 4*d.* which was conſidered as the immediate debt of the defendants, againſt whom that exceſs was, and which they provided for at the time. And this appears to be the true ſtate of the caſe. If then an expreſs agreement between theſe parties to that effect is to be col-

lected, that excludes all implied conſiderations. There was no promiſe of indemnity on either ſide, in caſe their reſpective acceptances were not provided for: but each party was to look to the liquidation of his claim on the other to the bills which he took in lieu of his own, and his remedy thereon, and to thoſe only. Then the law will not raiſe any *implied promiſe ultra* thoſe bills. The circumſtances of the caſe ſhow plainly that it was an exchange of ſecurities. In the firſt letter the defendants, in anſwer, as it appears, to a prior letter from the plaintiff, requeſting a renewal of the tranſaction through *Schneider* and Co. incloſe their bills, drawn on *S.* and Co. and on *Henderſon*, for 360*l.* 6*s.* 6*d.* on the whole, which they deſire the plaintiff to get accepted; and credit them for the amount againſt other drafts on him for the ſame amount, which, they obſerve, will finiſh the tranſaction. In another letter they write of other drafts which end the tranſaction: In another they mention a ſimilar exchange, which, "at maturity, will finiſh the tranſaction, except 5*s.* 4*d.* which we beg our friend, Mr. *Wells*, to pay you." Throughout, the defendants, when they incloſe bills to the plaintiff, ſpeak of valuing on him to the ſame amount. Nothing can ſhow more ſtrongly that this was a caſe of bills againſt bills for the ſame amount on the whole, though varying as to particular ſums. The defendants ſay, we will give you bills, accepted by certain perſons, in exchange for your acceptances. The plaintiff aſſents to that exchange. Then there is nothing elſe to look to on either ſide. The correſpondence, which is the baſis of the agreement between the parties, points to nothing elſe than an exchange of paper, which excludes all other conſideration. The holder of the bills has his remedy, firſt againſt the acceptor, and, if he fail to pay, then againſt the drawer. So, if the acceptor refuſe payment, the drawer has his remedy on the bill againſt him: but the plaintiff, as acceptor, has no remedy againſt the drawer for the payment of his own acceptance, becauſe he did not accept, in conſideration of a promiſe of indemnity, but in conſideration of an agreement, or rather of an actual and executed delivery of other acceptances to the ſame amount. Such is the ſituation of theſe parties; and it is only on the ground of an *implied* conſideration of indemnity, which is negatived by the facts, that this claim can be ſuſtained. Therefore the caſe falls within the ſame principle as governed that of *Rolfe* v. *Caſſon*, (*x*)

(*x*) *Ante* 166.

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The only difference is the trifling circumſtance of ſome of the bills becoming due two days before the counter-acceptances of the plaintiff, a circumſtance not regarded by the parties at the time. It is unneceſſary to ſay any thing of the caſes of *Brooks* v. *Rogers*, (y) and *Howis* v. *Wiggins* (z) though I have a decided opinion upon the ſubject: it is ſufficient for the preſent to obſerve, that the noble Lord, by whom the former of thoſe caſes was determined, afterwards changed his opinion, in the caſe *ex parte Seddon*,* and that the latter caſe has ſince been doubted in this court by ſome of the Judges in *Cowley* v. *Dunlop*."

Groſe, J. "The only queſtion is, Whether this were a caſe of exchange of ſecurities? And it plainly appears to have been ſo intended, by looking at the letters from the defendants to the plaintiffs, mention being made in them of finiſhing the tranſaction, that is, balancing the amount of the counter-bills to be accepted by the plaintiff, in lieu of thoſe from time to time ſent to him; and this too done with ſuch exactneſs as to direct the immediate payment of ſo ſmall a ſum as 5*s.* 4*d.* overdrawn on one ſide, in one of the bill tranſactions which paſſed between them. Then if this were the caſe of an exchange of ſecurities, and not that of principal and agent, it is ſettled that no action can be ſuſtained as upon an *implied* promiſe of indemnity. It was ſuggeſted to be like the caſe of *Howes* and *Wiggins*; upon which, if it were ſo, there would be much to be ſaid; but it is not neceſſary to enter into that conſideration here, for it is enough to ſay that it is not the ſame caſe."

Lawrence, J. "This is a caſe of mutual exchange of paper ſecurities, and not that of principal and agent; and therefore not a caſe on which any *implied* promiſe can be raiſed: and if not, then I think, for the reaſons given by me in *Cowley* and *Dunlop*, the plaintiff cannot recover. I abſtain from repeating the ſame arguments again, becauſe all that has occurred to me upon the ſubject will be found in the report of that caſe. Then the only remedy which the plaintiff has is upon the bills which he took in exchange for his own acceptances. But it is argued that the ſum for which this action is brought could not have been proved under *Buttivant's* commiſſion. I do not ſay whether it could or not; nor is it material now to decide that queſtion; becauſe the plaintiff's

(y) *Ante* 165. (z) *Ibid.* * *Ibid.* 163.

remedy

remedy is on the bills, and he must pursue that alone from whatever fund the payment is to come. It is enought to say that this action, which is founded on an implied promise, and not on the bills, cannot be supported. In *Cowley* v. *Dunlop* the court differed in opinion; Lord *Kenyon* and Mr. Justice *Ashhurst* holding that the plaintiff was entitled to recover, against my brother *Grose* and myself. With great deference to the opinion of those from whom we dissented, I will only observe, that Lord *Kenyon* mistook our meaning in imagining us to have considered that the amount of the bills given by the *Dunlops* could have been proved by the *Peters* under *Dunlops'* commission: We did not suppose that: we only endeavoured to show, that the *Peters*, having received a consideration for their own acceptances in the acceptances of the *Dunlops*, could not resort to an action upon an *implied assumpsit* against the *Dunlops*, on the ground of having paid the acceptances of the latter as well as their own. I mention this to guard against any mistake of what I meant to say from the way in which Lord *Kenyon* appears to have understood what I did say."

Le Blanc, J. "It has been argued, that this transaction was not a case of mutual accommodation, but one of principal and agent, or more properly speaking, principal and surety. And reliance has been principally had on the expression in the defendant's letters, that the plaintiff would procure the acceptances of *Henderson*, and the others; as if it were to be understood, that the plaintiff was desired to pledge his own credit with those persons in order to induce them to lend their acceptances. But clearly that is not the fair result looking at the whole transaction. The plaintiff was not to procure those acceptances by pledging any credit of his own, but on the sole account of the defendants; the real transaction being, that those acceptances were to be obtained by the defendants of their friends in exchange for the plaintiff's own acceptances. The acceptances thus interchanged tallied in effect in their respective amount; and when it happened that there was a difference of a few shillings in one transaction, that difference was immediately ordered to be paid up. From these circumstances I conclude that it was an exchange of acceptances for acceptances; and it makes no difference whether the acceptances so exchanged by the defendants, were their own, or procured by them from friends. Then the question

is, whether, in point of law, this amounts to an *implied* guarantee of each other's ſecurities? Or, whether it be not an *abſolute* exchange of the ſecurities themſelves, ſuch as they were, without any collateral reſponſibility? If the latter, as I conceive it is, then the law will not imply a promiſe to indemnify each other, if the ſecurities ſhould fail; but the remedy muſt be upon the ſecurity taken, according to the caſes of *Touſſaint* v. *Martinnant* (*a*) and *Martin* v. *Court*. (*b*) Suppoſing the plaintiff's acceptances had firſt become due, and he had paid it two days before the counter bill became due, would he have had an immediate remedy againſt the defendants as upon an implied promiſe to indemnify him? I conceive clearly not; but he muſt have waited and taken his remedy upon the counter bills, firſt proceeding to demand payment of the acceptors, and if they failed, then proceeding againſt the drawers. It is not material, however, now to conſider what is finally to be done upon the bills; it is ſufficient to ſhow that there is no implied promiſe whereon to ſuſtain this action. And thinking, as I do, that this was a caſe of mutual accommodation, and that each was to be anſwerable on the bills alone which were exchanged, I am of opinion, that the plaintiff cannot maintain this action on an *implied* promiſe in conſequence of having paid his own acceptances."

Where a bill is paid for the honour of the drawer, he is liable to an action of *indebitatus aſſumpſit* for money paid for the amount of the bill.

Thus, in the caſe of *Smith* and another v. *Niſſen* and another, (*c*) which was an action for money paid, laid out and expended. At the trial, before *Buller*, J. a verdict was found for the plaintiffs, under the following circumſtances: One *Taubert* ſent an order to the defendants for goods, and deſired that they would draw a bill on the plaintiffs for the value, which the defendants accordingly did after they had ſent the goods. The plaintiffs, in a letter written to the defendants on the 23d *September*, ſaid, that they could not accept the bill on account of *Taubert* at preſent, becauſe they, (the defendants) had ſent a larger quantity of goods than were ordered; adding, that they had written to *Taubert* for further directions. Two days afterwards the defendants wrote to

(*a*) *Poſt*, 181. (*b*) *Poſt*, 183. (*c*) 1 *Term Rep.* 269.

the

the plaintiffs, preſſing that the bill might be taken up; and on the 28th of the ſame month received for anſwer, that the plaintiffs had written to *Taubert*, and were waiting for his anſwer before they could accept; and that they had deſired the holder to keep the bill in the mean time. On the 14th *October*, *Taubert* in a letter to the plaintiffs, took notice that the orders had been exceeded, but deſired that they would accept the bill, and draw upon *Govertz* at *Hamburgh*, for the amount; in conſequence of which the plaintiffs drew on *Govertz*, who refuſed to accept; and afterwards the plaintiffs paid the bill for the honour of the drawer; to recover back the amount of which the action was brought.

A motion was afterwards made for a rule to ſhow cauſe why the verdict ſhould not be ſet aſide, upon the ground that the plaintiffs had actually accepted the bill drawn upon them. The counſel for the defendant admitted that notwithſtanding *Taubert's* letters the plaintiffs might have choſen whether they would accept or not: but he contended, that they had only a right to draw on *Govertz*, upon condition that they themſelves ſhould accept the bill drawn upon them, and therefore that their drawing upon *Govertz* was an implied acceptance of that bill.

But the court held, "that what the plaintiffs had done did not amount to an acceptance, for they never meant to make themſelves liable, unleſs the bill, drawn upon *Govertz*, was accepted and paid; and they would not imply a contract which the parties themſelves had refuſed to enter into."

5. *Of Money Paid by a Surety on Behalf of his Principal.*

Where money is paid by a ſurety in diſcharge of a bond entered into by him for his principal, he may recover againſt his principal the amount, by action of *indebitatus aſſumpſit* for money paid, upon an *implied* promiſe to pay, &c. (*d*)

So, a ſurety in a bond who pays the debt of his principal after a commiſſion of bankruptcy iſſued againſt the latter, is not barred by the certificate of the principal, though the penalty of the bond was forfeited before.

(*d*) 2 *Term Rep.* 104, *Eſp. N. P.* 96.

Thus, in the case of *Taylor* v. *Mills* and *Magnall*, (*e*) which was an action of *indebitatus assumpsit* for money paid, laid out and expended by the plaintiff to the use of the defendants. The defendants, *Mills* v. *Magnall*, were partners with one *Bailey*; and in order to raise money, the partnership had entered into bonds. In the year 1765, *Bailey* withdrew from the partnership; and wishing to be discharged from these bonds, application was made to the plaintiff to become surety instead of *Bailey*. He did so. Upon which the former bonds were delivered to *Bailey* to be cancelled; the bonds became due; then the defendants became bankrupts. When the obligees had got as much money as they could from the partnership estate, and which amounted to no more than 6*s*. in the pound, they came upon the plaintiff for the residue. He accordingly paid it; and then brought his action for money paid, laid out and expended. At the trial, an objection was made that the bonds were not executed by *Magnall*; in answer to which an affidavit was produced by *Magnall*, in which he admitted he was liable as well as the rest, and would have executed the bonds if he had been in the country at the time. Upon this the jury found a verdict for the plaintiff.

A motion, however, was afterwards made for a new trial, but the Court of *King's Bench* were clearly of opinion that the certificate was no bar to the action, and that the plaintiff was entitled to recover.

Lord *Mansfield*, Ch. J. said: "At the time of the bankruptcy, the defendants were not indebted to *Taylor*: he clearly, therefore, could not come in as a creditor under the commission. He was not damnified at that time: and till damnified, (which he could not be till he had been called upon and had paid,) he could not bring an action. He did not pay till after the commission issued. Consequently, his whole damage and cause of action arose after the bankruptcy; and therefore could not be discharged by the certificate. So the case stands as to the plaintiff. With respect to the money received by the original creditors under the commission it is a discharge of so much of the debt; and the surety is only liable for the remainder: consequently he can recover no more against the defendants. But as to that he is a new creditor, and therefore is not barred by the certificate. It seems to me an extremely clear case, and not different from

(*e*) *Cowp.* 525.

any

any where the cauſe of action, though it ariſes after the bankruptcy, is founded on a pre-exiſting ground."

But if a ſurety, (who becomes bound in a bond with his principal for payment of money by inſtalments,) takes a bond from his principal, conditioned for payment of the amount of the inſtalments before the firſt of them will be due; and before that time the principal become bankrupt and obtain his certificate; and afterwards the firſt bond be diſcharged by the ſurety, he cannot maintain an action of *aſſumpſit* againſt the principal for money paid to his uſe; his remedy being only upon the bond.

Thus, in the caſe of *Touſſaint* and others v. *Martinnant*, (*f*) which was an action of *indebitatus aſſumpſit* for money paid, &c. To which the defendant pleaded that he became bankrupt before the cauſe of action accrued to the plaintiffs. At the trial, the jury found a verdict for the plaintiffs, damages 1200*l.* ſubject to the opinion of the Court of *King's Bench* on the following caſe:

The defendant having borrowed ſeveral ſums of money amounting to 1500*l.* from different perſons, prevailed on the plaintiffs on the 8th of *November*, 1783, to execute, jointly with him, ſeveral bonds of this date to the perſons advancing the money, and thereby to become jointly and ſeverally bound with him for the payment of the principal and intereſt by inſtalments, the firſt of which was to become due on the 8th of *March*, 1786. The defendant by bond of the ſame date, 8th of *November*, 1783, became bound to the plaintiffs in 3000*l.* with a condition for the payment of 1500*l.* with intereſt on the 8th of *February*, 1784, and gave them a warrant of attorney to enter up judgment thereupon, which bond and warrant of attorney were given by the defendant to the plaintiffs to ſecure to them the payment of the 1500*l.* and intereſt for which they had ſo become engaged as aforeſaid. On the 13th of *Auguſt*, 1784, the plaintiffs ſigned judgment againſt the defendant for 3000*l.* debt, and 63*l.* coſts by virtue of the ſaid warrant; and on the 29th of *November*, 1784, ſued out a writ of *fieri facias*, returnable on the 24th day of *January*, 1785, upon which the goods of the defendant, to the amount of 1050*l.*, were taken. On the 2d of *December* 1784, a commiſſion of bankrupt iſſued againſt the defendant,

(*f*) 2 *Term Rep.* 100.

and he was thereupon declared to have committed an act of bankruptcy. On the 31ſt of *May*, 1785, the defendant obtained his certificate. Soon after the iſſuing of this commiſſion the aſſignees claimed the effects taken under the execution, and the ſheriffs, indemnified by them, delivered to them the goods, and returned *nulla bona* to the ſaid writ of *fieri facias*. The obligees in the inſtalment bonds proved the ſums due on their ſeveral bonds under the commiſſion againſt the defendant, and received a dividend of 5*s*. 6*d*. in the pound in reſpect thereof; and the reſt of the principal and intereſt ſecured by theſe bonds, amounting to 1200*l*. 4*s*. 7*d*., and for which this action was brought, was paid by the plaintiffs, after the date of the defendant's certificate, to the ſaid obligees, who thereupon by deed aſſigned over to them the ſubſequent dividends.

The Court were of opinion, that this form of action could not be ſupported; the plaintiff's only remedy being upon the bond.

Aſhhurſt, J. ſaid: "There is no doubt but that wherever a perſon gives a ſecurity, by way of indemnity for another, and pays the money, the law raiſes an *aſſumpſit*. But where he will not rely on the promiſe which the law will raiſe, but takes a bond as a ſecurity, there he has choſen his own remedy, and he cannot reſort to an action of *aſſumpſit*. Therefore in this caſe his only ſecurity is the bond. Poſſibly if the plaintiffs had recovered upon the bond when it was forfeited, and they were not afterwards damnified by being obliged to pay the inſtalments, by a bill in equity they might have been compelled to refund all that money which they had received. But at law the penalty of the bond became a legal debt, and as ſoon as that was forfeited they became creditors of the bankrupt, and might have proved their debt under the commiſſion. But ſtill the bond was their remedy; and they ſhall not be permitted to change their ſecurity upon a ſubſequent event, and reſort to that indemnity which the law would have raiſed."

Buller, J. "In ancient times no action could be maintained at law where a ſurety had paid the debt of his principal: and the firſt caſe of the kind, in which the plaintiff ſucceeded, was before *Gould*, J. at *Dorcheſter*, which was decided on equitable grounds. Now, why does the law raiſe ſuch a promiſe? Becauſe there is no ſecurity given by the party. But if the party chooſe to take a ſecurity, there is no occaſion for the law to

raiſe a promiſe. Promiſes, in law only exiſt where there is no expreſs ſtipulation between the parties; in the preſent caſe the plaintiffs have taken a bond, and therefore they muſt have recourſe to that ſecurity. It has been objected by the plaintiffs' counſel, that this bond could not be proved under the commiſſion of bankrupt; but there would have been no difficulty in that. 1ſt, It is ſaid that there is no conſideration for it; but clearly as a queſtion of law there is a ſufficient conſideration; for the ſurety binds himſelf to pay the debt of another, who afterwards becomes a bankrupt; the conſideration is therefore good in law, and it is not unreaſonable; for the ſurety may ſay he will only lend his credit for three months, and if the money be not paid at that time, he will call on the principal for his indemnity. The ſurety is the effective and reſponſible man; he is the perſon to whom the creditor principally looks, and he is taken becauſe the credit of the principal is doubted. There is as little foundation for the other objection, that the bond is fraudulent, becauſe it is made payable before the day on which the firſt inſtalment became due. It is not fraudulent againſt the eſtate of the bankrupt; for the bankruptcy cannot make any difference in this caſe. In no event could this circumſtance have that effect on the bankrupt's eſtate, which has been ſuggeſted. For in the caſe put, a court of equity would undoubtedly give relief. If it were attempted to prove the two bonds under the commiſſion, a court of equity would interpoſe, and would not ſuffer more than 20*s.* in the pound to be paid for the ſame debt. I do not, indeed, ſay by what particular courſe a court of equity would give relief; one way would be to compel the creditor to make his election to which of the two ſecurities he would reſort; or where the whole ſum had been proved under one of the bonds, they would compel the party in poſſeſſion of the other to give it up. But with reſpect to the form of this action, I am clearly of opinion, that it cannot be ſupported."

So, in the caſe of *Martin* v. *Court*, (*g*) which was an action of *debt* on bond dated 6th *July*, 1786, conditioned to pay the plaintiff 401*l.* with intereſt on the 4th *July*, 1787. Plea that the defendant became bankrupt on the 17th *April*, 1787. At the trial

(*g*) 2 *Term Rep.* 640.

a verdict was found for the plaintiff, ſubject to the opinion of the court on the following caſe:

"The plaintiff, the defendant, and one *Richard Franckcombe*, entered into a bond to *William Leak*, on 5th *July*, 1786, conditioned for the payment of 40*l.*, and intereſt thereon, on the 5th *July*, 1787, being for the debt of the defendant On the 6th of *July* 1786, the defendant entered into the bond in queſtion; upon the back of which bond was indorſed the following memorandum: 'The within bond is given and executed by the within bounden *Richard Franckcombe* and *Charles Court*, to the within named *Henry Martin*, to indemnify him for having on the 5th day of *July* inſtant, at the requeſt, and for the proper debt, of the within named *Richard Franckcombe* and *Charles Court*, entered into and executed a joint and ſeveral bond to *William Leak*, for the payment of the ſum of 40*l.*, and intereſt on the 5th *July*, 1787. Dated this 6th of *July*, 1786.' The firſt money paid by the plaintiff on the original bond was on the 17th of *Auguſt*, 1787. The defendant became a bankrupt on the 17th of *April* 1787, and afterwards obtained his certificate."

For the plaintiff it was contended that as he was not damnified till after the defendant's bankruptcy, he could not have proved the bond under his commiſſion, and therefore this action well lay.

But the Court were of opinion that this caſe fell within the principle of *Touſſaint* v. *Martinnant*; and that the plaintiff might have proved the debt under the defendant's commiſſion.

Aſhhurſt, J. ſaid: "Here the plaintiff admitted himſelf to be the debtor of the obligee in the original bond for a particular purpoſe. He agreed to become a ſurety for the defendant, but required to be indemnified at all events, and to have a ſecurity in his hands in caſe he ſhould be called upon. And this diſtinguiſhes it from the caſes cited by the plaintiff's counſel, where the bonds to indemnify were conditional, and the ſurety had not been damnified at the time of the bankruptcy. But this is an abſolute bond, payable to the plaintiff at all events; it was *debitum in præſenti, ſolvendum in futuro*, and therefore he might have proved under the defendant's commiſſion."

Groſe, J. ſaid: "There are two ways in which the plaintiff might have indemnified himſelf from the conſequences of having entered into the bond with the defendant. He might either have

have required that the money ſhould be placed in his hands, on a particular day before he could be called upon, or he might take a common bond of indemnity. If he had only taken the latter, this would have fallen within the caſes cited on the part of the plaintiff: but he was not contented with that; he inſiſted on having the money ſecured to him on the 4th of *July*, which was before the time when he could be called upon to pay the original bond. This bond then became a debt veſted at the time of the bankruptcy, which the plaintiff might have proved under the commiſſion."

If a perſon gives a promiſſory note for the debt of another, which the creditor accepts in payment, it has been held, that this amounts to a payment of money to the party's uſe, and may be recovered as ſuch.

Thus, in the caſe of *Barclay* and *Proctor* v. *Gooch*, (*b*) which was an action of *aſſumpſit* brought to recover a ſum of 50*l.* as ſo much money paid to the uſe of the defendant. The facts were theſe: The plaintiffs were brewers, and the defendant was a publican, who rented one of their houſes, at which a benefit club was held; the members of the club diſtruſting the credit of *Gooch*, (the then landlord,) the plaintiffs became his ſecurity for the amount of the ſubſcription money contained in the box; this amouted to 50*l.* *Gooch* afterwards became inſolvent, and the club called upon the plaintiffs for the money as his ſecurity, and took their note of hand for it, payable with intereſt.

The queſtion was, whether this was a payment of money to the uſe of the defendant on which the plaintiffs could recover on the count for money paid?

Lord *Kenyon*, Ch. J. held, "That the club having conſented to take the note from the plaintiffs, it was as payment to them of the money due by the defendant; it was payment of money to his uſe, and ſo the action was maintainable."

But in the caſe of *Taylor* v. *Higgins*, (*i*) where it appeared that the defendant being indebted to Mr. *Creſſwell*, and being preſſed for payment, he prevailed on the plaintiff, *Taylor*, to join with him in a bond to *Creſſwell* for 150*l.* That in *Auguſt*, 1800, the

(*b*) 2 *Eſp. Rep* 571. *See alſo* 3 *Wils.* 14. *Per curiam*, *S. P.*
(*i*) 3 *Eaſt Rep.* 169.

plaintiff

plaintiff and the defendant being both arrested, and then in custody at the suit of *Creſſwell*, in an action on the bond, the defendant paid the costs, and part of the debt, and, together with the plaintiff, executed to *Creſſwell* a new warrant of attorney for 120*l.*, the remainder of the debt. In *December* following the defendant was arrested at the suit of *Creſſwell*, and detained in custody; and in *July*, 1801, the present plaintiff and the defendant, being both then in custody, a declaration, by way of detainer, was lodged against them by *Creſſwell*; and on the 10th of *August* following the defendant took the benefit of an insolvent debtor's act, and was discharged under it. In *September*, 1802, the defendant was arrested, and holden to bail in this action by *Taylor* for 120*l.* on the affidavit to hold to bail before-mentioned: whereupon application was made by the defendant to *Creſſwell*, to know whether *Taylor* had paid him any money on account of the defendant, which was answered in the negative; but that after the defendant's discharge under the insolvent debtor's act, *Taylor* had given *Creſſwell* a new bond and warrant of attorney for the whole debt of 120*l.*, (for which this action was brought,) no part of which had yet been paid; but as appeared by the plaintiff's affidavit, he had at that time paid to *Creſſwell* about 7*l.* or 8*l.* for costs: and he also swore, that when such new security was given it was accepted as payment and satisfaction of the whole debt, and the whole bond and warrant of attorney were cancelled.

Lord *Ellenborough*, Ch. J. (after consulting with the other Judges of the court,) said: "There is no pretence for considering the giving this new security as so much money paid for the defendant's use. Supposing even the case of the note of hand or bill of exchange, as the current representative of money to have been rightly decided, still this security, consisting of a bond and warrant of attorney, is not the same as that, and is nothing like money."

6. *Of Money Paid by One of Several Persons, upon a Joint Undertaking or Liability, &c.*

Where two or more persons become surety for another, and one of the sureties pays the debt of the principal, he may maintain

tain an action of *indebitatus assumpsit* for money paid against each of the co-sureties to recover his aliquot proportion of the money so paid, regard being had to the number of sureties.

Thus, (*k*) if *S.* and *B.* are bound in an obligation to *J. S.* to pay a certain debt for *J. D.*, and the obligation being forfeited, *B.* says to *S.*, that if he will pay all the principal to *J. S.* he promises to repay him one moiety, and thereupon *S.* pays all accordingly to *J. S.*, *S.* may have an action upon the case upon this promise against *B.*, if he will not pay him the moiety; for though he might have been charged for the whole debt by the obligee, yet the payment thereof without suit, and in discharge of *B.* is a good consideration to maintain the action.

So, in the case of *Cowell* v. *Edwards*, (*l*) which was an action of *indebitatus assumpsit* for money paid by the plaintiff as administrator, under the following circumstances: "*John Cowell*, the plaintiff's intestate, having entered into a joint and several bond with seven other persons, two of whom were principals, and the five others, as well as himself, sureties, was, together with his co-sureties, called upon by the obligees to pay the sum engaged for; the defendant, and two of the other sureties paid each a part of that sum, but the present plaintiff's intestate paid the residue. Upon this the plaintiff, considering the defendant, and one of the two sureties, who had already contributed as the only solvent sureties, called upon them to pay their proportion, and brought this action to recover from the defendant such a sum of money, as when added to what had been already paid by him would make up one third of the whole sum paid to the obligees, deducting only what had been contributed by the fourth surety not called upon at the time."

At the trial before *Lord Eldon*, Ch. J. the plaintiff obtained a verdict for the sixth of the whole sum paid, not allowing for the sum paid by the fourth surety, with liberty to move the court to enter a verdict for the whole demand. On the part of the defendant, however, a rule was obtained, calling upon the plaintiff to show cause why this verdict should not be set aside altogether, and a new trial be had; and his counsel took these

(*k*) Bagg v. Slade, 1 *Rol. Abr.* 20. *pl.* 15. *Rol. Rep.* 354. 3 *Bulst.* 162. *Jenk.* 324. *pl.* 27. *S. C.*

(*l*) 2 *Bos. & Pul.* 268. *See also* Deering v. Lord Winchelsea, *ib.* 270. *S. P.*

objections,

objections, viz. "that this action could not be maintained at law by one co-surety against another; that if the action could be maintained for one-sixth of the whole sum engaged for, and which, under the circumstances of the present case, he insisted was all that could be recovered from the defendant, yet, that the insolvency of the two principals, and of the three other co-sureties, should have been proved, in order to entitle the plaintiff to the present verdict.

The Court observed, "that it might now, perhaps, be found too late to hold that this action could not be maintained at law, though neither the insolvency of the principals, or of any of the co-sureties, were proved; but that at all events the plaintiff could not be entitled to recover at law more than one-sixth of the whole sum paid. And Lord *Eldon*, Ch. J. said, "that he had conversed with Lord *Kenyon* upon the subject, who was also of opinion, that no more than an aliquot part of the whole, regard being had to the number of co-sureties, could be recovered at law by the defendant; though if the insolvency of all the other parties were made out, a larger proportion might be recovered in a court of equity."

But where three persons are jointly liable to pay a debt, and two of them pay it, they cannot maintain a joint action against the third to recover his aliquot proportion; but each must bring a separate action for his aliquot share of the money so paid.

Thus, in the case of *Brand* and *Herbert* v. *Boulcott*, (*m*) which was also an action of *indebitatus assumpsit* for money paid. The facts were these: "The plaintiffs sued out a commission of bankrupt against *T. L.* as joint petitioning creditors, and were chosen assignees under that commission, together with the defendant; and both the plaintiffs and the defendant acted as assignees under the commission. Each of the plaintiffs paid to the solicitor, under the commission, the sum of 104*l.* in discharge of his bill for expences incurred on account of the bankruptcy; and the present action was brought to recover the defendant's proportion of the 208*l.* paid by the plaintiffs."

The court determined that the plaintiffs could not maintain a joint action, but that separate actions ought to have been brought by each of them, for contribution against the defendant.

(*m*) 3 *Bos. and Pul.* 235. *See also* Graham *and others* v. Robertson, 3 *T. R.* 283. *S. P.*

However,

However, where *A.* was engaged as a partner in a particular tranſaction with *B. C.* and *D.* who were before partners, after which *B. C.* and *D.* became bankrupts; and, after their bankruptcy, *A.* paid a debt due from himſelf and them to a joint creditor; it was decided, that theſe three partners conſtituted but one debtor to *A.*, and that he might recover from *B.* the proportion of *B. C.* and *D.* towards the joint debt, *B.* not having pleaded in abatement. (*n*)

If *A.* at the inſtance of *B.* become a co-ſurety with him for the debt of *C.*, and *B.* is forced to pay the whole debt, he cannot recover a moiety thereof from *A.*

Thus, in the caſe of *Turner* v. *Davies*, (*o*) which was an action of *indebitatus aſſumpſit* for money paid, under the following circumſtances: There was an execution in the houſe of one *Evans*, at the ſuit of *Brough*, for 23*l.*; but to induce *Brough* to withdraw it, and to ſecure the debt, *Turner*, the plaintiff, and *Davies*, the defendant, joined in a warrant of attorney to *Brough*; but *Davies* had joined in conſequence of having been applied to by *Turner* and *Brough*, who required an additional ſecurity. *Turner*, the plaintiff, took a bill of ſale from *Evans* for his own ſecurity, dated 20th *January*, 1796; and an indorſement was made on it, declaring the purpoſe for which it was given. Another execution having iſſued againſt *Evans*, the goods were taken in execution, and *Turner*, the plaintiff, had paid the whole of *Brough*'s demand, and afterwards brought this action againſt the defendant for contribution of the moiety.

Lord *Kenyon*, Ch. J. "I have no doubt that, where two parties become joint ſureties for a third perſon, if one is called upon, and forced to pay the whole of the money, he has a right to call on his co-ſecurity for contribution: but where one has been induced ſo to become ſurety at the inſtance of the other, though he thereby renders himſelf liable to the perſon to whom the ſecurity is given, there is no pretence for ſaying that he ſhall be liable to be called upon by the perſon at whoſe requeſt he entered into the ſecurity. This is the caſe here: *Davies*, the defendant, became ſecurity, at the inſtance of *Turner*, the plaintiff, to *Brough*; and there is ſtill leſs pretext for *Turner* to call on the defendants in this action,

(*n*) *Vide* Wright v. Hunter, 1 *Eaſt Rep.* 20.
(*o*) 2 *Eſp. Rep.* 478.

as

as he took the precaution to ſecure himſelf by bill of ſale. I am of opinion the defendant ought to have a verdict."

If *A.* recovers damages in an action of *tort* againſt two defendants, and levy the whole damages on one, that one cannot recover a moiety thereof againſt his co-defendant for his contribution.

Thus, in the caſe of *Merryweather* v. *Nixon*, (*p*) where it appeared than one *Starkey* brought an action on the caſe againſt the preſent plaintiff and defendant, for an injury done by them to his reverſionary eſtate in a mill, in which was included a count in *trover* for the machinery belonging to the mill; and having recovered 840*l.* he levied the whole on the preſent plaintiff, who thereupon brought this action againſt the defendant for a contribution of a moiety, as for ſo much money paid to his uſe. But the Court of *King's Bench* determined that no contribution could by law be claimed, as between *joint wrong-doers*; and, conſequently, this action upon an *implied aſſumpſit* could not be maintained on the mere ground that the plaintiff had alone paid the money, which had been recovered againſt him and the other defendant in that action. And Lord *Kenyon*, Ch. J. ſaid, "That he never heard of ſuch an action having been brought, where the former recovery was for a *tort*; that the diſtinction was clear between this caſe and that of a joint judgment againſt ſeveral defendants, in an action of *aſſumpſit*; and that this deciſion would not affect caſes of indemnity, where one man employed another to do acts, not unlawful in themſelves, for the purpoſe of aſſerting a right."

So, where two perſons agree to buy ſtock and tickets for time, on ſpeculation, upon their joint account, and being loſers, one of them (without the knowledge of the other) pays all the money, he cannot maintain an action for contribution againſt his companion, the tranſaction being illegal. (*q*)

But it has been ſince determined, (*r*) that if two perſons jointly engage in a ſtock-jobbing tranſaction, and incur loſſes, and employ a broker to pay the differences, and one of them repay the broker, with the privity and conſent of the other, the whole ſum,

(*p*) 8 *Term Rep.* 186. (*q*) Thwaite v. Warner, *Lond. Sitt. Trin.* 1773. *Eſp. N. P.* 88.

(*r*) Petrie *and another* v. Hannay, 3 *Term Rep.* 418. *But ſee* Steers v. Lashley, 6 *Term Rep.* 61.

he

he may recover a moiety from that other, in an action for money paid to his uſe, notwithſtanding the tranſaction be illegal, and contrary to the ſtatute 7 *Geo.* II. c. 8.

If a party dine at a tavern, and one of them pays the reckoning for himſelf and the reſt of the company, he may recover from the others their aliquot proportions, by ſeparate actions againſt each. (*s*)

7. *Of Contribution to Party-Walls.*

By the ſtat. 14 *Geo.* III. c. 78. ſ. 41. it is enacted, "That the perſon or perſon at whoſe expence any party-wall, or party-arch ſhall be built, agreeably to the directions of this act, ſhall be reimburſed by the owner, or owners, who ſhall be entitled to the improved rent of the adjoining building, or ground, and who ſhall, at any time, make uſe of ſuch party-wall, or party-arch, a part of the expence of building the ſame, in the proportion after mentioned; that is to ſay, if the adjoining building then erected, or afterwards to be erected, be of the ſame rate or claſs of buildings as, or ſuperior to, the building belonging to the perſon or perſons at whoſe expence the ſaid party-wall was built, then the owner or occupier of ſuch adjoining building, or ground, ſhall pay one moiety of the expence of building ſo much of the ſaid party-wall, or party-arch, as ſuch owner or occupier ſhall make uſe of; and if the adjoining building then erected, or afterwards to be erected, be of an inferior rate or claſs of building, then the owner or occupier of ſuch adjoining building, or ground, ſhall pay a ſum of money, equal to one moiety of the expence of building a party-wall, or party-arch, of the thickneſs by this act required for the rate or claſs of building whereof ſuch adjoining building ſhall be, and of the height and breadth of ſo much of the ſaid party-wall, or party-arch, as ſuch owner or occupier ſhall make uſe of: and in the mean time, and until ſuch moiety or other proportional part of the expence of building ſuch party-wall, or party-arch, be ſo paid, the ſole property of ſuch whole party-wall, or party-arch, and of the whole ground whereon the ſaid party-wall ſhall ſtand, ſhall be veſted entirely in the perſon, or perſons, at whoſe expence the ſame ſhall be built: and ſuch moiety, or other proportional

(*s*) Per *Lord* Kenyon, 8 *Term Rep.* 614. 1 *Rol. Abr.* 24. *pl.* 31.

part

part of the expence of building ſuch party-wall, or party-arch, ſhall be ſo paid to the perſon or perſons at whoſe expence the ſame ſhall be built, or in whom the property thereof ſhall be veſted, at the times herein after mentioned; that is to ſay, in reſpect of every ſuch party-wall to any houſe, or building, whereunto, at the time of building the ſame, no other houſe or building was adjoining, ſo ſoon as ſuch party-wall ſhall be firſt cut into or made uſe of; and in reſpect of every ſuch party-wall, or party-arch, as ſhall be built againſt, or adjoining to any other houſe or building, ſo ſoon as ſuch party-wall or party-arch ſhall be completely built and finiſhed; and in reſpect of ſuch laſt-mentioned party-wall, or party-arch, the owner or occupier of ſuch adjoining houſe, or building, ſhall, together with ſuch proportional part of the expence of building ſuch party-wall, or party-arch, alſo pay a like proportional part of all other expences which ſhall be neceſſary to the pulling down the old party-wall, or timber or wood partition, and the whole of all the reaſonable expences of ſhoring up ſuch adjoining houſe, or building, and of removing any goods, furniture, or other things, and of pulling down any wainſcot or partition, and alſo all ſuch coſts, if any, as may have been awarded by the ſaid court of mayor and aldermen, or court of ſeſſions as aforeſaid, but not any part of the expence of pulling down and clearing away any ſuch old party-wall, or party-arch, or old partition, if any ſuch there was. And it is hereby directed, that the expence of building ſuch party-wall, or party-arch, ſhall be eſtimated after the rate of 7*l.* 15*s.* by the rod, for the new brick work, deducting thereout after the rate of 1*l.* 8*s.* by the rod for the materials, (if any) of ſo much of the old wall, or arch, as did belong to ſuch adjoining building, or ground; and alſo after the rate of 2*d.* by the cubical foot for the materials, (if any) of ſo much of the old timber partition as did belong to ſuch adjoining building, or ground; and that, within ten days after ſuch party-wall, or party-arch ſhall be ſo built, or ſo ſoon after as conveniently may be, ſuch firſt builder, or builders, ſhall leave, at ſuch adjoining houſe or building, a true account, in writing, of the number of rods in ſuch party-wall, or party-arch, for which the owner, or owners of ſuch adjoining building, or ground, ſhall be liable to pay, and of the deduction which ſuch owner or owners ſhall be entitled to make thereout, on account of ſuch materials, and alſo an account of ſuch other expences and coſts as aforeſaid; whereupon it ſhall be lawful for the tenant or occupier

cupier of ſuch adjoining building, or ground, to pay one moiety, or ſuch proportional part as aforeſaid, to ſuch firſt builder, or builders, for the ſame, and alſo for ſhoring and ſupporting ſuch adjoining building as aforeſaid, and for all ſuch other expences as are hereinbefore directed to be paid by the owner or owners of ſuch adjoining building, or ground, and to deduct the ſame out of the rent which ſhall become due from him, or her, to ſuch owner, or owners, under whom he or ſhe holds the ſame reſpectively, until he or ſhe ſhall be reimburſed the ſame: and in caſe the ſame be not paid within twenty-one days next after demand thereof, then the ſame ſhall and may be recovered, together with full coſts of ſuit, of and from ſuch owner, or owners, by action of debt, or on the caſe, in any of his Majeſty's courts of record, at *Weſtminſter*, wherein no eſſoin, protection, or wager of law, or more than one imparlance ſhall be allowed. And if the plaintiff, or plaintiffs, in any ſuch action ſhall, three calendar months, at the leaſt, before the commencement thereof, give notice, in writing, to the perſon or perſons againſt whom ſuch action is intended to be brought, of his, her, or their intention to bring the ſame, or leave the ſame at his, her, or their laſt or uſual place of abode, and ſhall, in ſuch notice, ſpecify the ſum for which it is to be brought, and alſo annex to ſuch notice a bill of the juſt and true particulars of the expences and charges with which the intended defendant, or defendants, is or are to be charged, then ſuch plaintiff, or plaintiffs, if he, ſhe, or they recover the full ſum ſpecified in ſuch notice, *ſhall alſo recover and be entitled to double coſts of ſuit*, and ſhall have and be entitled to the like remedies for recovery thereof as are uſually given for coſts in other caſes of coſts at law."

And by ſection 42. it is further enacted, by the authority aforeſaid, "That every party-wall hereafter to be built, and every addition which ſhall be made thereto, or to any party-wall which is already built or begun, ſhall be built agreeable to the directions herein contained, concerning the party-wall of the higheſt rate or claſs of building to which ſuch party-wall ſhall adjoin, when ſuch additions are completed; and that no party-wall now built, or hereafter to be built, ſhall, after the ſame, and the buildings adjoining thereto, is and are completed, be raiſed, unleſs the ſame, when raiſed, be of the full thickneſs ſuch party-wall is of in the ſtory next under the roof of the higheſt adjoining building; nor ſhall any party-wall hereafter be raiſed, unleſs the ſame can be

done with ſafety to ſuch wall, and the ſeveral buildings adjoining thereto: but all ſuch party-walls as will, when raiſed, be of the materials, heights, and thickneſſes hereinbefore required, or as can be ſafely raiſed, may, together with the ſhaft or ſhafts of the chimnies belonging thereto, be raiſed by and at the expence of the proprietor or occupier of any building to which the ſame belong, to any height he, ſhe, or they ſhall think proper. But if the proprietor or occupier of any building adjoining to the ſaid party-wall and chimney ſhafts ſhall make uſe of any part of ſuch party-wall and chimney-ſhafts, other than the uſe he makes of the chimney flues therein, which ſhall be ſo raiſed, then ſuch perſon ſo making uſe thereof, for the part ſo uſed, ſhall be chargeable with a proportionable ſhare of the expence of raiſing ſuch party-wall and chimney ſhafts; and, in computing ſuch charge, the ſame ſhall be rated in manner hereinbefore mentioned, and the proportion ſuch perſon ſhall be liable to pay ſhall be recovered in ſuch manner as is hereinbefore particularly declared concerning the firſt building of a party-wall."

Upon this act of parliament the party liable to contribute a moiety of the expence of building a party wall may be ſued by action of *aſſumpſit* for money paid. (*t*) As doubts, however, are frequently raiſed upon this ſtatute reſpecting the perſon liable to contribute, it may here be uſeful to preſent the reader with the different determinations to be met with in the reports upon this point.

The firſt caſe is *Southall* v. *Leadbetter*, (*u*) which was an action of *replevin*; and the defendant avowed as bailiff of *J. Winter*, for 30*l.* for a quarter's rent of a houſe in *Shugg Lane*.

At the trial, before *Lord Kenyon*, Ch. J. the jury found a verdict for the plaintiff, ſubject to the opinion of the court of *King's Bench*, on the following caſe, in order to try the ſingle queſtion whether *Lygow*, the aſſignee of the leaſe of the houſe, for which the rent was claimed to be due, or *Winter* was to pay the moiety of the expence of rebuilding a party-wall between that houſe and an adjoining one. "*Winter* was the landlord of the premiſes in queſtion, and was ſeiſed in fee thereof. *Lygow* was occupier of part of the premiſes, and was aſſignee of a leaſe thereof granted

(*t*) Vide 5 *Term Rep.* 130. 8 *Term Rep.* 602.
(*u*) 3 *Term Rep.* 458.

by *Winter* to one *Foulſton*, deceaſed, for twenty-one years, dated 3d *July*, 1786; by which leaſe, (reciting an agreement, in writing, dated the 14th *October*, 1784, between *Winter* and *Foulſton*, that the latter ſhould repair the meſſuage and premiſes therein mentioned, according to the particulars aſcertained by a ſurveyor, and that he would, on or before the 24th *June*, 1785, at his own coſt and charge, put the ſaid meſſuages, &c. into good and ſufficient repair; on finiſhing which, *Winter* would make a leaſe thereof to *Foulſton*, to commence from *Midſummerday* then laſt, for twenty-one years, under the rent of a pepper corn for the firſt half year of the term, and under the clear yearly rent of 120*l.* for the remainder of the term; and alſo reciting that *Foulſton*, in purſuance of that agreement, had repaired, &c.) *Winter* demiſed the premiſes to *Foulſton*, his executors, adminiſtrators, and aſſigns, according to that agreement. The leaſe alſo contained a covenant by *Foulſton* to pay, "from time to time, and at all times during the "term, the land-tax, and all other taxes, rates, aſſeſſments, and "impoſitions whatever, already laid, aſſeſſed, or impoſed upon "the ſaid premiſes, or on any part thereof, or upon the ſaid *John* "*Winter*, his heirs and aſſigns, in reſpect thereof, by authority of "Parliament, or otherwiſe howſoever." The caſe then ſtated that *Foulſton* laid out and expended, in the repairs of the premiſes, 150*l.*; and that, though the conſideration ſtated in the aſſignment to *Lygow* appears to be only 5*s.* yet that the ſum actually paid as the conſideration for it was 160*l.* The old wall was condemned in the year 1788; and the preſent party-wall was built according to the terms of the Act of Parliament. *Lygow* has paid for a moiety of the party-wall, the bills for which exceed the quarter's rent for which the diſtreſs was made: thoſe bills were tendered to *Winter* before the diſtreſs, but he refuſed to allow them. The premiſes in queſtion were, previous to the commencement of the preſent leaſe, let by *Winter*, at the rent 110*l. per annum*, out of which he allowed to the tenant the land-tax."

"The court determined that *Winter* was the perſon liable under the act to pay the moiety of the expence of rebuilding the party-wall. And Lord *Kenyon*, Ch. J. ſaid, "The improved rent mentioned in this Act of Parliament ſtands contradiſtinguiſhed from ſome other rent; but here no other rent was reſerved but that at the granting of the leaſe. But it is ſaid that the leſſee received from his aſſignee a ſum in groſs, as the conſideration for the purchaſe, which is equivalent to an improved rent. If, indeed, a

large ſum were paid for the purchaſe of a leaſe, though no improved rent were reſerved to the original leſſee, I think he would be liable to pay this expence within the Act of Parliament. But that is not the preſent caſe: for when *Winter* granted this leaſe he reſerved the beſt rent which could be procured for it at the time, ſince this rent exceeds the rent formerly reſerved by 10*l.* *per annum*, and the whole of the land-tax; and the caſe ought not to be varied by the circumſtance of the eſtate's gradually increaſing in a ſmall degree. Where the parties contract for a leaſe at rack rent, the landlord is the perſon who ought to bear the expence of the party-wall. Then it was contended that the full rent was not reſerved originally, becauſe it was ſtipulated that the tenant ſhould lay out a conſiderable ſum of money in improving the eſtate: but it muſt alſo be remembered, that in conſideration of that, the leſſee was to pay no rent for the firſt half year; which might have been conſidered at the time as commenſurate with the ſum to be laid out in the repairs. Neither is the leſſee concluded by the covenant to pay the taxes, aſſeſſments, impoſitions, &c. for that only extends to the land-tax, and all other taxes *ejuſdem generis:* but this is not a tax."

The next reported caſe is, *Peck* v. *Wood*, (*v*) which was an action of *aſſumpſit* to recover 42*l.* for half of the expence of a party-wall, between the plaintiff's and defendant's houſe, built by the former, under the ſtat. 14 *Geo.* III. c. 78. ſ. 41. On the trial, a ſpecial caſe was reſerved for the opinion of the Court of *King's Bench*, which ſtated, in ſubſtance, as follows:

"On the 18th *November*, 1788, the defendant entered into an agreement with *W. Pateman*, for a building leaſe of a piece of ground adjoining to the plaintiff's houſe in *Princes-ſtreet*, *Weſtminſter*, whereon was ſtanding a meſſuage and other buildings, for ſixty-one years, to commence from the 29th of *September* then laſt, at the yearly rent of 8*l.* free from all deductions whatſoever, whether parliamentary or parochial, then or thereafter to be impoſed or aſſeſſed, either on the landlord or tenant; and it was agreed that the defendant ſhould immediately proceed to pull down the premiſes, and erect thereon at leaſt one good ſubſtantial brick dwelling-houſe, with neceſſary convenient out-houſes and offices, &c. and to lay out and expend in the erection of ſuch new

(*v*) 5 *Term Rep.* 130.

building

building 300*l.* at leaſt. Purſuant to this agreement, a leaſe of the premiſes was granted and executed, in *January*, 1789, by *Pateman* to the defendant. The plaintiff, previous to the defendant's entering into the agreement with *Pateman* for the leaſe, had pulled down the old wall, which was ſtanding between his (the plaintiff's) houſe, and the houſe and premiſes which the defendant took upon leaſe as aforeſaid. On the 29th *September*, 1788, the party-wall was begun to be built; and on the 17th day of *January* following it was finiſhed. In *June*, 1790, the defendant let the houſe held of *Pateman* to *J. Beach*, at the yearly rent of 31*l.* 10*s.* the land tax and ſewer's tax deducted. It was abſolutely neceſſary that the old wall ſhould be pulled down. The defendant enjoys the improved rent; and *Pateman* is ſtill the ground landlord. The plaintiff did not give three months' notice in writing to *Pateman*, the then owner and ground landlord of the houſe and premiſes, which were afterwards leaſed to the defendant, prior to his pulling down the party-wall; but he applied to *Pateman* for that purpoſe, who agreed that it ſhould be pulled down, if *Hawkins*, the then tenant, would conſent; and *Hawkins* did conſent. The new party-wall is built agreeably to the directions of the ſtatute 14 *Geo* III. c. 78. The defendant has the benefit of the party-wall, and that in a greater degree than the plaintiff; his houſe extending farther back than the plaintiff's."

The Court were of opinion that the defendant, being owner of the improved rent, was liable to pay the expences of the party-wall; and that the defendant was not entitled to the three months' notice required by *ſect.* 38. of the act: and *Buller*, J. ſaid, "The three months required by ſect. 38. is only neceſſary in thoſe inſtances where the party is either ignorant of, or adverſe to, the building of the wall: but this was begun with *Pateman's* conſent, and before it's completion the poſſeſſion of the houſe was changed. The defendant, therefore, was not entitled to notice, he ſtanding in *Pateman's* place. And with regard to the principal queſtion, it would be unjuſt that *Pateman*, who receives a ground rent of 8*l.* only, and who derives no advantage from the party-wall, ſhould pay the expence of it; and that the defendant, who does enjoy it, and who is in the receipt of an improved rent of 31*l.* ſhould not contribute any part of this expence."

So, in the case of *Barrett* v. the Duke of *Bedford* (*w*) which was also an action of *assumpsit* to recover 195*l.* paid by the plaintiff for the proportionate part of the expences of a party-wall, built by the proprietor of the adjoining house, under the stat. 14 *Geo.* III. c. 78. s. 41. A verdict was taken for the plaintiff for that sum, subject to the opinion of the Court of *King's Bench* on the following case:

In the year 1786 the plaintiff, by assignment, became possessed of a lease, granted in the year 1762, by the defendant's grandfather, of certain premises on the north side of the *Great Piazza, Covent-Garden*, for a term of thirty years, of which about six years were then unexpired, under a yearly rent of 60*l.* On the 6th *October*, 1788, a new lease was granted by the defendant to the plaintiff, for a term of thirty-one years, to commence at the expiration of the said lease, or *Lady-day*, 1792, at 60*l. per annum*. The last mentioned lease is stated to be granted in consideration of the great expence and charges which the plaintiff had been at in repairing the premises, and also in consideration of the following, among other covenants: "And likewise that the said *Michael* "*Barrett*, his executors, administrators and assigns, shall and will, "from time to time, and at all times during the continuance of "the said term hereby granted, bear, pay, and discharge all "taxes, rates, duties, assessments, and impositions of what nature "or kind soever, and whether parliamentary or parochial, im- "posed or charged, or which, at any time during the term hereby "granted, shall be imposed or charged on the hereby demised "premises, or any part thereof, or upon the landlord for the "time being in respect thereof, or of the said rent reserved for "the same; it being the true intent and meaning of these pre- "sents, and of the parties hereto, that the said Duke of *Bedford*, "his heirs and assigns, shall have and receive the said yearly "rent or sum of 60*l.* hereby reserved, in net money, without "any deduction, defalcation, or allowance out of the same, on "any account whatsoever; and that he, the said *Michael Barrett*, "his executors, administrators, and assigns shall and will, during "the term hereby granted, as often as need shall require, bear, "pay, and allow a reasonable share and proportion of, or for and "towards supporting, repairing, amending, and cleansing all

(*w*) 8 *Term Rep.* 602.

"party-

" party walls, party-gutters, common ſewers, public ſewers, and " drains belonging or which at any time during the ſaid term " hereby granted ſhall belong to the ſaid hereby demiſed pre- " miſes, or any part thereof." Theſe covenants were *verbatim* as in the old leaſe, with the exception of ſuch parts as relate to the payment of the land-tax by the tenant, which by the former leaſe was paid by the landlord, and the amount of which was 22*l.* 10*s. per annum.* The demiſed premiſes conſiſt of two ſhops on the ground-floor, and a range of apartments above ſtairs. Before the pulling down and building of the party-wall hereinafter mentioned, one of the ſhops was under-let by the plaintiff by leaſe for ſeven, fourteen, or twenty-one years, at the yearly rent of 60*l.*, the plaintiff covenanting to pay all the taxes, and for water. And the other of the ſhops was under-let by the plaintiff by leaſe to one *J. Alditch* for twenty-one years, at the rent of 26*l.* 5*s.*, the plaintiff covenanting to pay all the taxes. The reſidue of the demiſed apartments was kept by the plaintiff for ſeveral years in his own hands, but at the time when the party-wall was built, he had let them furniſhed to one *Searle* for twenty-one years, at the yearly rent of 210*l.*, the plaintiff covenanting to pay all the taxes. At the time the party-wall was built, the taxes, paid by the plaintiff, amounted to 72*l.* 3*s.* a year.

The court determined that the tenant, (not the landlord,) was bound to pay the moiety of the expence of the party-wall.

Lord *Kenyon*, Ch. J. ſaid: " If there were no covenants in the leaſe applicable to this ſubject, there would be great weight in the plaintiff's argument: but it is not neceſſary to conſider which of theſe parties would have been liable under the act of parliament; *modus et conventio vincunt legem.* I think it was the intention of the parties to this leaſe, that the expence of the party-wall ſhould be borne by the tenant. Had there been nothing more in the leaſe than the tenant's covenant to pay ' taxes, ' rates, duties, aſſeſſments and impoſitions, whether parlia- ' mentary or parochial.' I ſhould have entertained the ſame opinion in this caſe that I expreſſed in one of the caſes cited, that thoſe words did not extend to building a party-wall: but the latter part of that covenant by which the tenant covenanted that the landlord ſhould receive the ' yearly ſum of 60*l.* in net money,

without any deduction or allowance out of the ſame,' and the covenant reſpecting the 'repairing of all party-walls,' &c. ſatisfy me that the parties intended that this expence ſhould fall on the tenant."

The laſt reported caſe on this ſubject is, *Sangſter* v. *Birkhead*,(*) which was an action of *replevin*. Avowry for rent in arrear; and iſſue thereupon. The facts were theſe: One *Woodward* and his wife being ſeiſed in fee of a houſe in *London*, by leaſe, bearing date 29th of *March*, 1777, demiſed it to the defendant for a term of twenty one years, which expired at *Lady Day*, 1798, at the yearly rent of 44*l.*, deducting the land-tax. The defendant demiſed the houſe for eighteen years and ten months from the 1ſt of *May*, 1770, to one *Robert Sugden*, at the yearly rent of 60*l.*, alſo deducting the land-tax. In this leaſe, amongſt the other uſual covenants on the part of the leſſee, there was one to make "all needful and neceſſary reparations and amendments "whatſoever," in which no exception was made as to accidents by fire, nor was there any covenant on the part of the leſſee to inſure. The leaſe was aſſigned by *Sugden* for a valuable conſideration; and, after ſeveral meſne aſſignments, came on 19th *May*, 1787, to the preſent plaintiff. In *May*, 1795, a fire having happened in the adjoining houſe, by which that houſe was entirely conſumed, and the roof of the plaintiff's injured, the owners of the ſcite of the adjoining houſe being deſirous to rebuild, had the party-wall examined by four ſurveyors, and delivered a certificate to the plaintiff according to the ſtatute 14 *Geo.* III. c. 78. ſ. 38., that the wall was, by the opinion of the ſaid ſurveyors, condemned as decayed and ruinous. It was accordingly rebuilt, and the plaintiff called upon for a moiety of the expence. This he paid, and deducted out of the rent due to the defendant, who diſtrained for rent in arrear to that amount.

The court decided, that the defendant was liable to contribute to the expences of the party-wall; and that the operation of the ſtatute could not be varied by any covenants to repair entered into between the landlord and his tenant.

(*) 1 *Bos. & Pul.* 303.

Eyre,

Eyre Ch. J. ſaid: "I dare ſay that the leading object of the legiſlature was to make the owner of the improved rent liable, as oppoſed to the ground landlord. But though that may have been the leading object, yet the expreſſions of the act being ſuch as they are, we muſt deal with them as well as we can, and find an owner of the improved rent in all caſes, though there ſhou d be no ground rent reſerved. Here the original landlord made a leaſe for twenty-one years to a perſon who again under-let the premiſes. Who then is the perſon to be conſidered as the owner of the improved rent but the man who on all the ſubſiſting leaſes has the beſt rent? But whether he be the perſon or not, I have much doubt, as the queſtion now ſtands, if the defendant can avail himſelf of the objection which he has taken. I think that it was intended by the legiſlature, that the tenant ſhould pay a moiety of the expence to the perſon building the wall, and reimburſe himſelf by deducting the amount out of the rent of his immediate landlord, leaving it to him to make his claim on ſuch other perſon as he may think liable. That appears to me the beſt conſtruction for putting the buſineſs in a practicable ſhape. I ſhould incline to that opinion, even if it were made out that the covenant, on the part of the tenant to repair, included this caſe: for though the conduct of the tenant might be a breach of covenant, it would be fitter that the damages ſhould be ſettled in an action of covenant, than to break in on the rules eſtabliſhed by the ſtatute. It is eaſy to ſee, that this is an ill-penned law, and its meaning is left uncertain; but in the preſent caſe I do not know how to determine who is the owner of the improved rent, if it be not the perſon who takes the beſt rent. Poſſibly it may be ſaid that *Woodward* and the d-fendant ſhould pay in certain proportions; let them, however, ſettle that in ſuch actions as they may think fit to bring. I know no way of executing this law if we enter into all the derivative claims of different landlords. If the tenant pays the money, let him reimburſe himſelf, and leave the other parties to diſpute among themſelves."

8. *Of Monies Paid by Attornies, Sheriffs, Gaolers, and others, in Conſequence of ſome Neglect of Duty, &c.*

Where an annuity has been vacated by reaſon of a defect in the memorial, and the attorney who prepared the conveyances is ſued by the grantee for negligence, and a verdict recovered againſt him to the amount of the conſideration-money paid for the annuity, which he pays, he cannot recover it over againſt the grantor.

Thus, in the caſe of *Burdon* v. *Webb*, (*y*) which was an action of *aſſumpſit* for money paid. The facts were theſe: *Webb* had granted an annuity to *A. B.*, and *Burdon* was the attorney for the grantee. A memorial of this annuity not having been properly regiſtered, on application to the court it had been ſet aſide, and the grantee being at that time dead, his executors brought an action againſt *Webb* for money had and received, being the conſideration paid to him for the annuity, and had a verdict againſt him. *Webb* being then in diſtreſſed circumſtances, and not paying the money recovered againſt him, the executors brought an action againſt *Burdon* for negligence: Before the trial, he gave a cognovit for the amount of the conſideration money paid for the annuity, and afterwards paid it; and this action was brought againſt *Webb* for the money ſo paid.

But Lord *Kenyon*, Ch. J. ſaid: "It cannot be ſupported, that a party by his own act, and without the conſent of another, by paying money for him, can maintain an action on it; if it was ſo, it would be of the worſt conſequences, as by that means a man might get his greateſt enemy for his creditor: if a ſurety pays money for his principal, as ſuch was paid by reaſon of the ſecurity, he may maintain an action for it againſt his principal. I have often ruled that point; but in the preſent inſtance the caſe is very different, the money has been paid by the attorney for his own negligence, and this being in conſequence of an action brought againſt himſelf, it will not entitle him to maintain an action againſt the defendant." The plaintiff muſt be nonſuited.

(*y*) 2 *Eſp. Rep.* 527.

So,

So, where a ſheriff or gaoler voluntary ſuffers a priſoner to eſcape, and in conſequence thereof is obliged to pay the amount of the debt for which the priſoner was committed to priſon, he cannot maintain an action againſt ſuch priſoner for the money ſo paid.

Thus, in the caſe of *Eyles* v. *Faikney*, (z) where it appeared, that the defendant being a priſoner in the cuſtody of the plaintiff (who was a warden of the *Fleet Priſon*) on meſne proceſs, at the ſuit of one *Holland*, a written authority came from *Holland* to the plaintiff to diſcharge the defendant out of his cuſtody, but *Molley*, the plaintiff's deputy, having doubts as to the authenticity of the diſcharge, applied to *Holland* to know whether it was his hand writing. *Holland* confeſſed he had ſigned the paper, but ſaid, that he had been impoſed on by the defendant, and therefore countermanded the authority. The defendant inſiſted that the authority to diſcharge him was irrevocable, and threatened *Molley* with an action, if he detained him; and *Molley* thinking that *Holland* could not revoke his order, diſcharged the defendant out of his cuſtody. *Holland* afterwards brought an action in the *Common Pleas* againſt the plaintiff for an eſcape, and recovered a verdict and 300*l.* damages, to recover which money the preſent action was brought, as for money paid, laid out and expended. The cauſe was tried before Lord *Kenyon*, Ch. J. at *Weſtminſter*, but his lordſhip being of opinion, that the plaintiff had been guilty of a breach of his duty in permitting this defendant to eſcape, ruled that he ought not to be permitted to come as a plaintiff into a court of juſtice; and therefore ordered a nonſuit. His lordſhip's opinion was afterwards confirmed by the Court of *King's Bench*, upon a rule to ſhow cauſe why the nonſuit ſhould not be ſet aſide.

But a ſheriff's officer who diſcharges a defendant on payment of the ſum ſworn to, and is afterwards obliged to pay the reſidue of the debt, may recover it from the defendant as money paid to his uſe.

Thus, in the caſe of *Cordron* v. Lord *Maſſerene*, (a) which was an action of *aſſumpſit* for money paid, laid out and expended. The plaintiff being a ſheriff's officer had arreſted the defendant on a writ againſt him. The writ was indorſed for bail for 306*l.* 11*s.*

(z) *K. B. Eaſt Term.* 32 Geo. III. *Peake's Cas. N. P.* 144. *n. a.*
(a) *Peake's Cas. N. P.* 143.

(the

(the ſum for which the bond was given,) and on the defendant paying the plaintiff this money and the coſts he diſcharged him. The ſheriff was afterwards called upon to return the writ, and the plaintiff in the original action inſiſting on being paid his intereſt, the preſent plaintiff paid that money to prevent an attachment being ſued out againſt the ſheriff. The preſent action was brought to recover this money.

The defendant's counſel contended, that this action could not be maintained. 1ſt, They ſaid that this payment was merely voluntary. The plaintiff had not been compelled to pay it, nor could he, for he was not liable to more than the ſum ſworn to. 2dly, That this was within the rule laid down in *Eyles* and *Faikney*, for the plaintiff had no authority to diſcharge the defendant without the conſent of the plaintiff in the former action, or his attorney. But *Buller*, J. before whom this was tried, ſaid: "This is not a voluntary payment, the plaintiff would have been obliged to pay the whole ſum due by law, for though bail above cannot be charged with more than the ſum ſworn to, yet it is not ſo with the ſheriff or the defendant, againſt whom the plaintiff may recover the whole of his debt. To bring this within the caſe of *Eyles* and *Faikney*, the defendant ſhould ſhow ſome improper conduct in the plaintiff, and then I admit the rule that a plaintiff muſt draw his juſtice from pure fountains would apply: but if I were to determine that the plaintiff had done wrong in this caſe, I muſt ſay, that a ſheriff's officer could not in any caſe receive the debt and coſts, and diſcharge the defendant, which might be attended with very miſchievous conſequences to the defendant."

Where an auctioneer was employed to ſell an eſtate, the loweſt price of which was fixed by the owner, and written down by him on a piece of paper, which was put under a candleſtick at the time of ſale, with the privity of the auctioneer, but not ſigned by the owner, nor any notice in writing given to the auctioneer of the price ſo ſet down, nor had the auctioneer given the previous notice of the ſale to the collector of the duty, as required by the acts of the 19 *Geo.* III. c. 56. and 28. *Geo.* III. c. 37: but being aſked at the ſale whether he had taken the proper precautions to avoid the duty in caſe there were no ſale, he ſaid, that it was his mode to fix a price under the candleſtick,

ſtick, and if the bidding did not come up to that price it was no ſale or duty: it was held, that the duty having attached, though there were no ſale, for want of taking the precautions required of the owner by the ſtatutes under ſuch circumſtances; and the auctioneer having been ſued for the duty on his bond to the crown, and compelled to pay it, he could not recover it over againſt the owner; he having warranted that proper precautions had been taken to prevent the duty attaching in the event; though both parties were miſtaken in the law. (*b*)

(*b*) Capp v. Topham, 6 *Eaſt.* 392. *See alſo* Spurrier v. Elderton, *ante*, *tit.* Principal, Factor, *and* Agent, *vol.* 1. *p.* 258, 9.

CHAPTER

CHAPTER IV.

Of Money Due upon an Account Stated.

IF two perſons, having dealings together, balance their accounts, the law implies that he, againſt whom the balance appears, has engaged to pay it to the other, though there be not any actual promiſe. And from this implication it is frequent for actions of *aſſumpſit* to be brought, declaring that the plaintiff and defendant had ſettled their accounts together, *inſimul computaſſent*, (which gives name to this ſpecies of *aſſumpſit*,) and that the defendant engaged to pay the plaintiff the balance, but has ſince neglected to do it. (*a*)

Thus, in the caſe of *Egles* v. *Vale*, (*b*) in error, which was an action of *aſſumpſit*, "for that the plaintiff and defendant accounted "together for monies received by the defendant, who was found "in arrear 10*l.*, and in conſideration thereof promiſed to pay it "the 19th *March* following, &c." It was aſſigned for error, that there was no conſideration; for the being found in arrear is not any cauſe to make a ſpecial promiſe, nor is any thing done on the plaintiff's part whereon this promiſe ſhould be grounded, *viz.*, forbearing the ſuit, &c. *Sed non allocatur*; for the debt itſelf, without other ſpecial cauſe, is ſufficient to ground the action.

So, where partners balance their joint accounts *inter ſe*, the partner in whoſe favour the balance is ſtruck may maintain an action of *aſſumpſit* againſt his co-partner for the amount of ſuch balance, declaring generally upon an account ſtated. (*c*)

(*a*) Vide 3 *Bl. Com.* 164.
(*b*) *Cro. Jac.* 69. *Telv.* 70. *S. C. See alſo* 1 *Rol. Abr. fo.* 7. *pl.* 1. *fo.* 9. *pl.* 11. 2 *Mod.* 44. 1 *Dan. Abr.* 52.
(*c*) 2 *Term Rep.* 479. 483. *n.* et vide *ante, tit.* Partners, *Vol.* 1. *p.* 329.

CHAPTER

CHAPTER V.

Of Intereſt.

A CONTRACT, or promiſe to pay intereſt, is lawful, if it do not exceed the rate allowed by ſtatute; and an action of *aſſumpſit* or debt will lie upon ſuch promiſe.*

But no action will lie upon an implied promiſe to pay intereſt, though in actions of *aſſumpſit* for money lent; (*a*) money paid; (*b*) money due upon an account ſtated; (*c*) upon bills of exchange, promiſſory notes, (*d*) and other contracts, where a ſpecific ſum of money is to be paid on a day certain, (*e*) intereſt is generally re-

* Vide *Cro. Car.* 272. *Pal.* 291. 10 *Mod.* 312. 5 *Term Rep.* 553. 1 *Vin. Abr.* 297. *Com. Dig. tit. Action upon* Aſſumpſit, *F.* 4. *But ſee* 1 *Rol. Abr.* 18. *l.* 15. 20. 30.

(*a*) *Bunb.* 119. 2 *Bl. Rep.* 761. 1 *H. Bl.* 305.

(*b*) 1 *H. Bl.* 305.

(*c*) 3 *Wils.* 205. 2 *Bl. Rep.* 761. *But in the caſe of* Challie *v. the Duke of* York, *K. B ſitting after Eaſt. Term,* 46 Geo. III. *at Weſtm. M. S. S. which was an action of* aſſumpſit *for wine ſold and delivered, and for money due on an account ſtated. On the trial, it was proved that the wine was delivered in the year* 1799; *and in the year* 1800 *the account was ſtated and ſettled by an agent of the Duke; and the ſum of* 300*l. was admitted to be due to the plaintiff.*

Upon this evidence the counſel for the plaintiff claimed intereſt upon this ſum from the time of the ſettlement of the account to the day on which the plaintiff would be entitled to final judgment; and, in ſupport of this claim, the caſe in Wilſon's Reports was cited.

But Lord Ellenborough, *Ch. J. before whom the cauſe was tried, ſaid, "Intereſt is never allowed for goods ſold, or on an account ſtated, except there be an expreſs agreement, or the money is to be paid on a particular day; and I believe the caſe cited has never been acted upon."*

(*d*) *Bunb.* 119. *Bayley on bills,* 90. 91. *Chitty on bills,* 213. 4 *Eſp. Rep.* 14.

(*e*) 2 *Ld. Raym.* 773. *See alſo Fonb. Treat. of Eq.* 2 *Vol.* 438.

covered

covered by way of damage: and it is uſually computed from the day the money is payable to the time of final judgment. (*f*)

No intereſt, however, is allowed in actions for goods ſold and delivered, and work and labour, unleſs there is a ſpecial agreement, or a particular cuſtom to pay intereſt. (*g*)

(*f*) 2 *Burr.* 1085. 1 *Bl. Rep* 263
(*g*) *Bunb.* 119. 3 *Wilſ.* 206. 2 *Bl. Rep.* 761. 1 *H. Bl.* 305. 4 *Bro. P. C.* 539.

CHAP.

CHAPTER VI.

Of Contracts for the Sale of Goods.

IT is intended to conſider the ſubject matter of this claſs of contracts in the following order:

1. *Of the General Rules, &c. Relating to Contracts for the Sale of Goods, &c.*
2. *Of Payment of Earneſt.*
3. *Of a Conditional Sale of Goods, &c.*
4. *Of Sales by Public Auction.*
5. *Of the Time of Payment, &c.; and of the Sale of Goods for Ready Money, or upon Credit by Bills or otherwiſe.*
6. *Of Goods Bargained and Sold, but not Delivered.*
7. *Of Goods Sold and Delivered; and what ſhall be deemed a ſufficient Delivery thereof.*
8. *Of Goods Sold to One and Delivered at his Requeſt to a third Perſon.*
9. *Of the Sale of Contraband Goods, or Obſcene and Libellous Prints, &c.*

1. *Of General Rules Relating to Contracts for the Sale of Goods, &c.*

In *Sheppard's Touchſtone*,* it is ſaid, "If a man by word of mouth ſell to me his horſe, or any other thing, and I give him, or promiſe him nothing for it, this is void, and will not alter the property of the thing ſold. But if one ſell me a horſe, or any other thing for money, or any other valuable conſideration; and the ſame thing is to be delivered to me at a day certain, and by our agreement a day is ſet for the payment of the money; or all, or part of the money is paid in hand; or I give earneſt money (albeit it be but a penny) to the ſeller; or I take the thing bought by agreement into my poſſeſſion, where no money is paid, earneſt given, or day ſet for the payment; in all theſe caſes there is a good bargain and ſale of the thing to alter the property thereof: and in the firſt caſe, I may have an action for the thing, and the ſeller for his money: in the ſecond caſe, I may ſue for and recover the thing bought: in the third, I may ſue for the thing bought, and the ſeller for the reſidue of the money: in the fourth caſe, where earneſt is given we may have reciprocal remedies one againſt another; and in the laſt caſe the ſeller may ſue for his money."

So, in *Noy's Maxims*,† it is ſaid, "If I ſell my horſe for money, I may keep him until I am paid; but I cannot have an action of debt until he be delivered; yet the property of the horſe is by the bargain in the bargainor or buyer. But if he do preſently tender me my money, and I do refuſe it, he may take the horſe, or have an action of detainment. And if the horſe die in my ſtable between the bargain and the delivery, I may have an action of *debt* for my money, becauſe, by the bargain, the property was in the buyer."

There is, however, this diverſity when the day of payment is limited, and when not: in the firſt caſe, the contract is good immediately, and an action lies upon it without payment; but in the other not ſo: as if a man buy of a draper twenty yards of cloth, the bargain is void if he do not pay the money at the

* *Page* 224. † *Page* 88. *See alſo* 7 *East Rep.* 571.

price agreed upon immediately; but if the day of payment be appointed by agreement of the parties, in that caſe one ſhall have his action for the money, and the other for not delivering the cloth. (*a*)

If two are agreed upon the price, and the buyer departs without tendering the money, and comes the next day and tenders it, the other may refuſe; for he is not bound to wait, unleſs a day of payment was agreed between them. (*b*)

So where *A.* having propoſed to ſell goods to *B.* gave him a certain time, at his requeſt, to determine whether he would buy them or not; *B.* within the time determined to buy them, and gave notice thereof to *A.*; yet *A.* was not liable to an action for not delivering them; for *B.* not being bound by the original contract, it was held there was no conſideration to bind *A.*

Thus, in the caſe of *Cooke* v. *Oxley*, (*c*) which was an action of *aſſumpſit*; the declaration ſtated, that on, &c. a certain diſcourſe was had, &c. concerning the buying of 266 hogſheads of tobacco; and in that diſcourſe the defendant propoſed to the plaintiff that the former ſhould ſell and deliver to the latter the ſaid 266 hogſheads, (at a certain price;) whereupon the plaintiff deſired the defendant to give him (the plaintiff) time to agree to or diſſent from the propoſal till the hour of four in the afternoon of that day, to which the defendant agreed; and thereupon the defendant propoſed to the plaintiff to ſell and deliver the ſame upon the terms aforeſaid, *if the plaintiff would agree to purchaſe them upon the terms aforeſaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day*; the plaintiff averred that he did agree to purchaſe the ſame upon the terms aforeſaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day; he alſo averred that he requeſted the defendant to deliver to him the ſaid hogſheads, and offered to pay to the defendant the ſaid price for the ſame, yet that the defendant did not, &c. Upon this declaration the court determined, that the action could not be ſuſtained, there being no conſideration for the promiſe.

Lord *Kenyon*, Ch. J. ſaid: "Nothing can be clearer than that

(*a*) *Per curiam*, Dy. 30. *a.* (*b*) *Bro. Contract pl.* 26. 5 *Vin. Abr* 515.
(*c*) 3 *Term Rep.* 653.

at time of entering into this contract, the engagement was all on one ſide; the other party was not bound; it was therefore *nudum pactum.*"

Buller, J. ſaid: "It is impoſſible to ſupport this declaration in any point of view. In order to ſuſtain a promiſe there muſt be either a damage to the plaintiff, or an advantage to the defendant: but here was neither when the contract was firſt made. Then as to the ſubſequent time, the promiſe can only be ſupported on the ground of a new contract made at four o'clock; but there is no pretence for that. It has been argued, that this muſt be taken to be a complete ſale from the time when the condition was complied with: but it was not complied with, for it is not ſtated that the defendant did agree at four o'clock to the terms of the ſale; or even that the goods were kept till that time."

But, it is ſaid, (*d*) if a man agree to ſell goods for ſo much as *A.* ſhall name, though the contract is not complete till *A.* names the price, yet if the vendor ſell the goods to another before *A.* names the price, and *A.* afterwards name it, an action upon the caſe lies for the non-delivery of the goods.

If *A.* ſell cloth to *B.* for 10*s.*, and *B.* takes away the cloth againſt the will of *A.*, in this caſe *A.* ſhall have an action of trepaſs againſt *B.*, and if *A.* ſell cloth to *B.* for 10*s.*, in his election to make it a bargain or not, and, if he will, he may keep his cloth until the other pay him; and if *A.* ſay nothing, but doth ſuffer *B.* to take it away, he may make it a bargain if he will, and bring an action of *debt* for his money. (*e*) So, if I offer money for a thing in a market or fair, and the ſeller agree to take my offer, and whilſt I am telling the money as faſt as I can, he doth ſell the thing to another; or when I have bought it, we agree that he ſhall keep it until I can go home to my houſe to fetch the money; in both theſe caſes, eſpecially in the firſt, the bargains are good, ſo as the ſeller may not ſell them afterwards to another; and upon the payment, or tender and refuſal of the money agreed upon, I may take and recover the things. (*f*)

(*d*) *Kit.* 181. *a.* *See alſo Com. Dig tit.* Agreement, *A.* 4.
(*e*) *Shep. Touch.* 225. (*f*) *Ibid.*

If

If goods are marked, or have the ſeal of the buyer upon them, the property is ſaid to be veſted in him immediately, and that they remain in the hands of the ſeller only as a ſecurity for the price. (*g*)

If one ſell me any thing by the tod, pound, buſhel, yard or ell; it ſhall be accounted me aſſured, and reckoned according to the cuſtom of the country or place, and not according to the ſtatute meaſures of other countries. If one ſell me twenty barrels of ale, or ten bottles or cups of wine; by theſe bargains I ſhall not have the barrels, bottles or cups with the ale or the wine. But if one ſell me a hogſhead or a firkin of wine, it ſeems by this bargain I ſhall have the hogſhead and firkin with the wine. (*h*)

By the ſtatute 29 *Car.* II. c. 3. ſ. 17. "no contract for the ſale of goods for 10*l.* or upwards, ſhall be good, except the buyer ſhall accept and actually receive part of the goods ſold, or give earneſt to bind the bargain, or in part of payment, or ſome memorandum in writing of the bargain be made or ſigned by the parties to be charged by ſuch contract, or their agents thereunto lawfully authoriſed." *

2. *Of Payment of Earneſt.*

After earneſt given upon the ſale of goods, the vendor cannot ſell them to another without a default in the vendee: and therefore if the vendee do not come and pay for, and take away the goods, the vendor ought to go and requeſt him; and then if he does not come and pay for, and take away the goods in a convenient time, the agreement is diſſolved, and the vendor is at liberty to ſell them to any other perſon. (*i*)

Earneſt given, upon a ſale of goods, does not alter the property of the goods contracted for, but only binds the bargain. (*k*)

(*g*) *Skin.* 647. *Holt*, 8. (*h*) *Sheppard's Touchſtone*, 225.

* *For the caſes and determinations upon this clauſe of the ſtatute*, vide *ante Vol.* I. *Chap.* IV. *ſ.* 6.

(*i*) Per Holt, *Ch. J.* 1 *Salk.* 113. *Bul. N. P.* 50. 6 *Mod.* 162. *Skin.* 647. (*k*) Vide *Bul. N. P.* 50.

But, in the case of *Back* v. *Owen*, (*l*) which was an action of *assumpsit*; the declaration stated, that on the 1st of *May*, 1792, it was agreed, that the plaintiff should give the defendant a colt in exchange for the defendant's mare, and should pay the defendant two guineas to boot on the 17th of *December* following; that it was further agreed, that the plaintiff should keep the colt until the 29th of *September* following; that mutual promises were made, &c.; that the defendant, "to make the agreement the more firm and binding, paid to the plaintiff one halfpenny in earnest of the bargain; that the plaintiff kept the colt until the 29th of *September*; and that the plaintiff was ready, and offered to pay the defendant the two guineas, and requested him to accept the same, but that the defendant would not receive the said money, and that he had not delivered the mare to the plaintiff, although often requested so to do, &c."

To this declaration the defendant demurred: and showed for cause, that it did not appear by the declaration, that the plaintiff was ready and willing, or offered to deliver to the defendant in exchange for the mare. And in support of the demurrer, it was contended, that where the doing of one thing by one party is to be the consideration of another to be performed by the other party, the performance of the one party must be averred before that party can maintain an action against the other for the non-performance of his part of the agreement. And in support of this was cited *Co. Lit.* 51. b.; *Callonel* v. *Briggs*, *Salk.* 112. *Thorpe* v. *Thorpe*, *Salk.* 171.; and *Jones* v. *Barkley*, *Doug.* 684. a. And, in this case, it was insisted that the plaintiff should have averred, that he had delivered, or had offered to deliver the colt to the plaintiff.

Defendant

But the Court over-ruled the demurrer; and *Buller*, J. said; "There is no foundation for the objection taken by the defendant's counsel: the payment of the halfpenny vested the property of the colt in the defendant; and therefore it was unnecessary for the plaintiff to show that he had tendered the colt to the defendant."

(*l*) 5 *Term Rep.* 409. *See also Com. Dig. tit.* Biens, *D.* 3. *and* 2 *Bl. Com.* 448.

What-

Whatever ſum is given as earneſt, or as a depoſit, is to be deemed part of the price, when the goods come to be paid for, unleſs there be an expreſs ſtipulation to the contrary. (*m*)

3. *Of a Conditional Sale of Goods, &c.*

If an agreement be made for the ſale of goods upon this condition, *viz.*, *if he like or diſlike them upon view*; when he firſt has ſeen them, and agreed or diſagreed, approved or diſapproved of the goods, the bargain is then complete or void; though he afterwards diſagree or agree to the contrary. (*n*) But if the condition be, *if he like or diſlike the goods at ſuch a day*; if he declare his liking or diſlike *before* the day, he may alter it *at* the day. (*o*)

So, if cattle or goods are ſold and delivered upon a contract that the vendee ſhall uſe them a *certain* time on trial, the vendee may retain them the whole time allowed, even though he ſhould have expreſſed his diſlike to them long previous to the expiration of the period allowed for trial.

Thus, in the caſe of *Ellis* v. *Mortimer*, (*p*) which was an action to recover the ſum of thirty guineas, as the price of a horſe ſold by the plaintiff to the defendant. At the trial it appeared, that the plaintiff having a horſe to ſell, offered him to the defendant, and it was agreed, that the defendant ſhould give thirty guineas for the horſe if he liked him, and ſhould take him a month upon trial: that the defendant having accordingly taken the horſe, and kept him for about a fortnight, told the plaintiff, upon being aſked how he liked the horſe, that he liked the horſe but not the price; upon which the plaintiff deſired, that if the defendant did not like the price, he would return the horſe, that the defendant after this kept the horſe ten days, and then ſent him back, the month originally agreed upon for trial not being expired; but that the plaintiff refuſed to receive him.

Mr. Juſtice *Chambre*, before whom the cauſe was tried, told the jury, that it was not competent to the plaintiff to vary the

(*m*) Pordage v. Cole, 1 *Saund.* 320. (*n*) *Bro. Contract*, 27. 1 *Rol. Abr.* 449. *l.* 22. *See alſo Com. Dig. tit.* Agreements, *A.* 4.
(*o*) 1 *Rol. Abr.* 449. *l.* 25. (*p*) 1 *New Rep. C. B.* 257.

time of trial originally agreed upon, but that if it could be inferred that the old agreement, for a month's trial, was put an end to, and a new agreement to take the horſe was made, the plaintiff was entitled to a verdict. The jury found a verdict for the plaintiff.

A rule, however, was afterwards obtained, calling on the plaintiff to ſhow cauſe why the verdict ſhould not be ſet aſide, and a new trial granted. The Court, after argument, determined that the action could not be ſupported; and accordingly made the rule abſolute for a new trial.

Sir *James Mansfield*, Ch. J. ſaid: "This action is founded on a contract, not upon the unjuſt detention after the converſation between the parties. The firſt queſtion then is, what was the contract? It was agreed that the horſe ſhould be ſold for thirty guineas, but that the defendant ſhould have a month's trial, and ſhould be at liberty to return him at the end of the month if he did not like him. If, indeed, the defendant had made up his mind not to buy the horſe, at the time when the converſation took place, it was a very unhandſome thing to keep him to the end of the month. But ſtill that was the contract. The effect of the contract ſeems to me to be, that the defendant ſhall have to the end of the month to judge whether he likes the horſe at the price. It is poſſible that he might not like the horſe at the end of the week, and yet might be willing to give the whole price at the end of the month. The plaintiff having brought his action on the contract, and the defendant having offered to return the horſe, I do not think that the action can be ſupported; the defendant is therefore entitled to a new trial."

Heath, J. "I am of the ſame opinion. The defendant, if he pleaſed, had to the end of the month to decide whether he would return the horſe, though it was in his power to determine the contract earlier by returning the horſe ſooner. In the fluctuations of his mind he might not like the horſe at one time and might at another; and he had not determined the contract until he had actually returned the horſe."

Rooke, J. "I am of the ſame opinion. I conſider this as a contract for a month's trial; and that being ſo, the party had a right to take into his conſideration for a month, not only the goodneſs of the horſe, but his goodneſs with reference to the price."

Chambre,

Chambre, J. "In my opinion the original contract was entirely determined, and the plaintiff cannot say that it was determined for one purpose and not for another. If the contract was entirely determined, and the defendant afterwards chose to detain the horse, the plaintiff should have brought an action of trover. In either way therefore of considering the case, whether the original contract subsisted or was determined, the defendant is entitled to a new trial. Perhaps the jury were, in some degree, misled by my observations."

4. *Of Sales by Public Auction.*

When goods are put up to sale by public auction, and a bidding is made, the bidder may retract his bidding at any time before the lot is *actually* knocked down to him by the auctioneer.

Thus, in the case of *Payne* v. *Cave*, (*q*) which was an action of *assumpsit* for not paying a deposit upon a lot of goods sold at an auction; the circumstances of the case were as follow: The goods were put up in one lot at an auction, there were several bidders, of whom the defendant was the last, who bid 40*l*; the auctioneer dwelt on the bidding, on which the defendant said, "why do you dwell? You will not get more." The auctioneer said, he was informed the worm weighed at least 1300*cwt*., and was worth more than 40*l*.; the defendant then asked him, whether he would warrant it to weigh so much, and receiving an answer in the negative, he then declared he would not take it, and refused to pay for it. It was re-sold on a subsequent day's sale for 30*l*.; and the action was brought for the difference. Lord *Kenyon*, Ch. J., before whom the cause was tried, being of opinion, on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff. A motion, however, was made to the Court of *King's Bench* for a rule to set aside this nonsuit, on the ground that the bidder was bound, by the conditions of the sale, to abide by the bidding, and could not retract. But the court thought the nonsuit very proper; and said: "The auctioneer is the agent of the vendor, and the assent of both

(*q*) 3 *Term Rep.* 148.

parties

parties is neceſſary to make the contract binding: that is ſignified on the part of the ſeller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one ſide, which is not binding on either ſide till it is aſſented to: but, according to what is now contended for, one party would be bound by the offer and one not, which can never be allowed." The rule was therefore refuſed.

If goods are fairly ſold at a public auction, and the buyer refuſes to accept and pay for them, he is liable to an action of damages for breach of his contract: but if the owner of the goods ſecretly employs puffers to bid for him at the ſale, it is a fraud on the real bidders, and the higheſt bidder cannot be compelled to complete the contract.

Thus, in the caſe of *Howard* v. *Caſtle*, (*r*) which was an action of *aſſumpſit*: the declaration ſtated, that the plaintiff was poſſeſſed of a leaſehold eſtate, which, on the 23d of *March*, 1795, ſhe put up to ſale by auction, on certain conditions, among which were the following: that the higheſt bidder ſhould be the purchaſer; that the purchaſer ſhould, at the ſale, pay 25*l. per cent.* into the hands of the auctioneer, and ſign an agreement to pay the remainder before the 31ſt of *March*; and that if the purchaſer ſhould neglect to comply with the conditions, the depoſit money ſhould be forfeited; the plaintiff ſhould be at liberty to reſell the premiſes; and the defendant ſhould make good any deficiencies attending the reſale, with coſts. It then ſtated, that the defendant was the higheſt bidder, at the ſum of 357*l.* yet that he had refuſed to pay the depoſit, or to complete the purchaſe; that afterwards, on the 10th of *April*, 1795, the plaintiff again put up up the premiſes to ſale, by public auction, when they were ſold for 273*l.*; that the deficiency, together with the coſts and the depoſit money, which the defendant ought to have paid at the firſt ſale, amounted to 200*l.* 14*s.*; yet that the defendant had not paid, &c.

At the trial before Lord *Kenyon*, Ch. J. it appeared, that at the firſt ſale, at which the defendant was declared the purchaſer, there was no other real bidder, but that all the other bidders were puffers, employed by the plaintiff; that the defendant, on diſ-

(*r*) 6 *Term Rep.* 642. *Vide* Bexwell v. Chriſtie, *S. P. Cowp.* 395. *Et ante, Vol.* 1. *p.* 257.

covering

covering this, refuſed to complete the contract; that at the ſecond ſale there was one real bidder, of the name of *Gander*, who offered 270*l.*; and that at that ſale the premiſes were bought in for the plaintiff, at 273*l.* For the defendant, it was objected, on the authority of *Bexwell* v. *Chriſtie*, *Coup.* 395, that, as all the other bidders at the firſt auction were puffers employed by the plaintiff, the whole was a fraud and impoſition on the defendant; and that he was not bound to complete his contract. Lord *Kenyon* was ſtrongly inclined to be of this opinion; but in order to prevent the expence of another trial, his Lordſhip directed the jury to aſſeſs the damages for the plaintiff, and reſerved the point of law for the opinion of the Court of *King's Bench*. The jury, under this direction, found a verdict for the plaintiff, with 10*l.* 15*s.* damages; but, upon a motion to ſet aſide the verdict, and to enter a nonſuit, the court were of opinion that the ſale was fraudulent, and therefore no action could be maintained; a nonſuit was accordingly entered.

Lord *Kenyon*, Ch. J. ſaid, "In conſidering the nature of the plaintiff's demand, it becomes neceſſary to enquire what brought the different perſons together at the auction, and on what terms they met when they went there to bid. The plaintiff's eſtate was advertiſed to be ſold by auction, and one of the conditions of the ſale was, that the higheſt ſhould become the purchaſer: it was to be preſumed alſo that no fraud was to be practiſed on thoſe who were preſent to induce them to bid more than they were inclined to offer. At this ſale the defendant bid a certain ſum, and afterwards refuſed to complete his purchaſe. Now, if there were no fraud in this tranſaction, the plaintiff has a right to call on the defendant, in a court of juſtice, for a ſatisfaction for non-performance of the agreement: but it appeared at the trial that the whole tranſaction was bottomed in fraud; it was fraud from the beginning to the end; the parties did not meet on equal terms; ſeveral other perſons beſides the defendant bid, who repreſented themſelves as embarking on their own judgment; but it afterwards turned out that this was falſe, and that this was an impoſition practiſed by the plaintiff on the defendant; for all thoſe other perſons were authorized by the plaintiff to bid for him. I will not go into the general reaſoning on this ſubject; becauſe it is very ably ſtated by Lord *Mansfield*, in the caſe alluded to. Only part of that reaſoning has now been adverted to by the plaintiff's counſel; but the reſt of it is applicable to this

caſe.

caſe. The whole of that reaſoning is founded on the nobleſt principles of morality and juſtice, principles that are calculated to preſerve honeſty between man and man. The Acts of Parliament that have been referred to, did not intend to interfere with this point, but to leave the civil rights of mankind to be judged of as they were before. In the caſe cited, Lord *Mansfield* mentioned an inſtance in which the owner may legally and fairly bid at the auction, namely, where, before the bidding begins, he gives public notice of his intention; and in ſuch a caſe no duty is to be paid under the Acts of Parliament that have been referred to. The circumſtance of puffers bidding at auctions has been always complained of; if the firſt caſe of this kind had been tried before me, perhaps I ſhould have heſitated a little before I determined it; but Lord *Mansfield*'s comprehenſive mind ſaw it in its true colours, as founded in fraud; he met the queſtion fairly, and made a precedent which I am happy to follow."

If goods are bought at a public ſale, the owner may recover the price for which they were ſold, by action of *indebitatus aſſumpſit*, as *for goods bargained and ſold*, though the goods are re-ſold in conſequence of the buyer's default in not fetching them away within the time limited by the conditions of ſale.

Thus, in the caſe of *Mertens* v. *Adcock*, (*s*) which was an action of *aſſumpſit*, brought to recover damages for not taking away goods ſold by public ſale, and for the difference in price, being a loſs on the reſale. The declaration ſet out the conditions of ſale, and averred the ſale of the goods ſpecified. One averment in the declaration, in ſetting out the conditions of ſale, was, "that the purchaſer ſhould make a depoſit of £. (not ſetting out on the record any ſum whatever); and that, if any purchaſer ſhould omit to take away the goods within the time limited by the conditions of ſale, it ſhould be lawful to re-ſell them by public ſale, or private contract," &c.

The plaintiff proved the purchaſe of the goods, and the conditions of ſale; but it appeared that ten *per cent.* was to be made as a depoſit. The counſel for the defendant therefore objected to the variance; and that the plaintiff could not recover.

It was anſwered by the plaintiff's counſel, who ſeemed to admit the objection to be valid, that, putting that out of the queſtion,

(*s*) 4 *Eſp. Rep.* 251.

there

there was a count in the declaration for goods bargained and ſold, on which the plaintiff would be entitled to recover; that the defendant had become the purchaſer; and they were properly knocked down to him, though never delivered, by reaſon of his own default; that he was therefore liable for the price of the goods, as bargained and ſold.

It was, however, contended, that the defendant could not be liable; that it appeared in this caſe the goods had been re-ſold; and the action was brought for the loſs on the re-ſale. In the caſe of goods bargained and ſold, the defendant muſt be in a ſituation to deliver them, the contract being on an exiſting ſale and a non-delivery: but here the plaintiff, in caſe he recovered on the count for goods bargained and ſold, would not have the goods to deliver. But Lord *Ellenborough*, Ch. J. ſaid, "that that could not prevent the plaintiff from recovering; for if he had recovered on the count for goods bargained and ſold, the defendant might maintain an action of trover for them. As ſoon as the lot was knocked down to him, he became the buyer; they were goods bargained and ſold, &c." The plaintiff accordingly obtained a verdict upon all the counts except the firſt.

5. *Of the Time of Payment, &c. and of the Sale of Goods for Ready Money, or upon Credit by Bills or Otherwiſe.*

If an agreement be made for the ſale of goods at ſuch a price, without either payment or mention of payment, the contract ſhall be void if the vendee do not pay, or offer to pay for them upon delivery: for, in every bargain payment ought to be made on the delivery of the goods, except where a future day is agreed upon between the buyer and ſeller: and this is to be done notwithſtanding earneſt be given upon the bargain; for that only makes the contract complete; (*t*) and if the vendee becomes inſolvent, or bankrupt, whilſt the goods are in their paſſage, and before they are actually delivered to him, the vendor may ſtop them *in tranſitu*. (*u*)

(*t*) *Vide Dy.* 20. *a. Hob.* 41, 2. *Bro. Contract*, 25, 26. *Kit.* 181, *b. See alſo* Moreton *v.* Lamb, 7 *Term Rep.* 125. Rawſon *v.* Johnſon, 1 *Eaſt Rep* 203 *Bul. N. P* 50.

(*u*) *Vide Co. Bankrupt Laws, c.* 8 *ſ.* 17. *where moſt of the caſes on this ſubject are to be found.*

So,

So, if goods are ſold upon an agreement to pay for them in ready money, the price muſt be paid at the time of delivery. If, however, the goods be delivered to the vendee without payment, and an action is brought for the price, and it happens that the vendor, at the time of delivery, is indebted to the vendee in a ſum of money equal to the amount of the goods ſold, the vendee may ſet off his debt againſt the amount of the goods, notwithſtanding the agreement to pay ready money.

"Thus, in the caſe of *Eland* v. *Karr* and others, (*v*) which was an action of *indebitatus aſſumpſit* for goods ſold and delivered. The defendants pleaded a ſet-off for money due, upon various bills of exchange, and alſo for money had and received on the 14th *March*, 1800. Replication, that on the 22d *March*, 1800, it was agreed between the plaintiff and defendants, that the defendants ſhould pay to the plaintiff for the goods *in ready money*. To this replication there was a general demurrer; and, in ſupport of which, it was contended, that an agreement to pay for goods in ready money admits of a ſet-off in the ſame manner as any other debt; and that the agreement to pay for the goods on delivery is merely to aſcertain the time of payment. The counſel for the plaintiff argued thus: "that a party who contracts to pay for goods in ready money could not ſubſtitute any other mode of payment; and that this was an attempt to ſubſtitute the ſet-off of another debt in lieu of money, and that too in a caſe where the damages were unliquidated; that there was a known difference between a ready-money price and a price upon credit; and here the defendant obtained the goods at the leſſer or ready-money price, and now attempts to avail himſelf of a mode of payment adapted to a credit price. But the court decided, that as at the time of the commencement of the plaintiff's action, which was the time to be regarded, there was a debt due from the defendant to the plaintiff, the latter was entitled, under the ſtatute 2 *Geo.* II. to ſet it off; that no objection aroſe from the damages being unliquidated; for that was the caſe in all actions of *aſſumpſit*, when damages are claimed for a breach of contract in non-payment of money; that the form of the plea was an order to ſet-off and allow, out of the debt due to the defendant, ſo much as the damages ſuſtained by the plaintiff amounted to by the defendant's not performing his promiſe; and in eſtimating the plaintiff's damages in this caſe, the jury would

(*v*) 1 *Eaſt. Rep.* 375.

take

take into conſideration the loſs he had ſuſtained by non-payment of the ready money.

If *A.*, in conſideration that *B.* had bargained and ſold to him certain tuns of ſtrong beer, promiſes *B.* to pay him 4*l.* for every tun *ſuper deliberationem inde* of thirty tuns of ſtrong beer, an action lies upon this promiſe for ſo many tuns as he delivers before the delivery of all the thirty tuns. (*w*)

But in the caſe of *Waddington* v. *Oliver*, (*x*) which was an action of *indebitatus aſſumpſit* for goods ſold and delivered, where it appeared that on the 10th of *September* 1804, the plaintiff agreed with the defendant to ſell him one hundred bags of *Kent* hops, merchantable, of the growth of 1804, at 56*s.* *per* hundred weight, to be delivered on or before the 1ſt *January*, 1805, as it might be agreeable to the plaintiff; that on the 12th of *December* twelve bags were delivered; and on the ſame day, or the next, payment thereof was demanded, which being refuſed, the writ was ſued out on the 13th of *December*. For the plaintiff it was urged, that, as no time was ſtipulated for payment, the defendant was bound to pay for them as they were delivered. The court, however, were clearly of opinion, that the contract was entire, and could not be ſplit; and that the plaintiff, therefore, had no right to bring an action until the whole quantity was delivered, or until the time for delivering the whole had arrived.

So, in the caſe of *Alexander* v. *Owen*, (*y*) it was determined, that where goods are delivered under an agreement to take a ſpecific parcel of copper money in payment, a delivery of ſuch copper was a good bar to an action for the value of the goods, though, in fact, it was counterfeit money, but unknown to the defendant.

So, when a tradeſman gives credit for goods at the time of the ſale, he cannot bring an action till the time of credit is expired: but if the time of credit is given or extended after the ſale, or if the ſale is not *bonâ fide*, the party need not wait the full time, but may ſue for his debt immediately.

Thus, in the caſe of *De Symons* v. *Minchwich*, (*z*) which was an action of *aſſumpſit* for goods ſold and delivered. One part of

(*w*) Field v. Dale, *Rol. Abr.* 29. *pl.* 2. 1 *Dan. Abr.* 62. *pl.* 2.
(*x*) 2 *New Rep. C. B.* 61. (*y*) 1 *Term Rep.* 225.
(*z*) 1 *Eſp Rep* 430 *See alſo* 2 *Eſp Rep.* 523. *S. P. Per Lord* Kenyon. *and* 4 *Eaſt Rep.* 76.

the

the defence was, that the action was brought before the time of credit was expired. In the course of the evidence it appeared, that the plaintiff had sold jewels to the defendant to the amount of 500*l.* for ready money, as the plaintiff asserted, but as a witness for the defendant proved, on information from the plaintiff himself, to be paid for on the 1st of *November*, subsequent to the bill of sale, before which time, namely, on the 22d of *October*, the action had been commenced. To rebut this defence, the plaintiff proved, that almost immediately after the sale, the defendant had pawned the jewels with different pawnbrokers, and that suspecting the defendant not to be the person he represented himself to be, he had arrested him before the time alluded to.

Eyre, Ch. J. said, "If the credit given was voluntary, subsequent to, and not making any part of the original contract, it certainly might, at any time, be retracted: but if it made part of the contract, it is so material a part of it, that if the action be brought within the time limited for credit, it cannot legally be supported, unless it was not a *bonâ fide* purchase at the time by the vendee. For if he meant to impose on or defraud the vendor of his goods, the defence will not avail. But those are circumstances for the consideration of the jury only, to whom he left it." The jury (which was a special one) found a verdict for the defendant.

So, when goods are sold upon a contract that the vendee shall pay for them *in three months, by a bill of two months*, it is a credit of *five* months; and therefore no action of *assumpsit* for *goods sold and delivered* can be brought at the end of *three* months, upon the neglect of the vendee to give his bill at two months; the remedy being by a special action on the case for damages, for the breach of contract in not giving such bill.

Thus, in the case of *Mussen* v. *Price* and another, (*a*) which was an action of *assumpsit* for goods sold and delivered, tried before Mr. Justice *Rooke*, at the *Lancaster* Lent assizes, 1803; and the only question was, whether the action was commenced before the time of credit on which the goods had been contracted to be brought was expired? The goods in question were a quantity of cotton, valued at 217*l.* for which payment was to be made by the

(*a*) 4 *East Rep.* 147. *See also* Dutton v. Solomonson, 3 *Bos. & Pul.* 582. *S. P.*

defendants

defendants, in three months after the 15th of *September*, 1802, (the day on which the bargain was concluded) by a bill of two months. The action being commenced in *Hilary* Term, 1803, before the expiration of five months from the 15th of *September* preceding, the defendant's counsel objected that it was prematurely brought, and therefore that the plaintiff should be nonsuited: but the learned Judge held, that unless the defendants could show (which they did not do,) that they had given or tendered such a bill at the end of the three months, the action would lie for goods sold and delivered. Accordingly, the plaintiff recovered; but the point was saved for the consideration of the Court of *King's Bench*.

A motion was made for a rule to set aside the verdict, and for leave to enter a nonsuit. A rule *nisi* was granted principally upon the authority of a case, *Miller* v. *Shawe*, at *Lancaster*, *Lent* assizes, 1801, before Mr. Justice *Chambre*, which was stated to be as follows: (*b*) "Action for goods sold and delivered. The plaintiff's evidence proved, that the goods were sold at two months, and two months, that is, to be paid for at two months by a bill at two months; which the witness considered as cash at four months. The action was brought before the expiration of the four months, and the declaration was in the usual form, containing the usual counts of *indebitatus assumpsit*, and *quantum valebant* for the amount. *Topping*, for the defendant, contended, that no debt existed at the commencement of the action, nor till the four months were expired; but that the plaintiff might have brought his action after the expiration of the two months, and before the end of the four months, upon a breach of his contract for the non-delivery to him of a bill; but that no action of *indebitatus assumpsit* would lie till the end of the four months. *Cockell*, serjeant, and *Yates*, contended, that as the defendant had not given the bill at the end of the two months, they might abandon the contract, and recover the price of the goods for want of the bill, which, if given, the plaintiff was to accept in lieu of the money. And *Chambre*, J. at first seemed to be of that opinion, but on hearing *Topping*, for the defendant, as above, he thought that after the four months the plaintiff need not have declared on the contract, but the money being then due and unpaid, he might declare in the usual way,

(*b*) *Vide* 4 *East Rep.* 149.

and recover the price as a debt on an *indebitatus aſſumpſit*. Before that time, however, he thought the plaintiff's only remedy was for breach of the promiſe, in not delivering the bill at two months. Plaintiff nonſuited."

In the principal caſe, after cauſe had been ſhown againſt the rule, the Court of *King's Bench* determined that the action for *goods ſold and delivered* could not be ſuſtained till the end of five months; and accordingly made the rule abſolute. But Lord *Ellenborough*, Ch. J. differed in opinion with the reſt of the court, and thought the action was well brought: the Judges therefore delivered their opinions *ſeriatim*, as follow:

Lord *Ellenborough*, Ch. J. ſaid, "The only queſtion here is as to the form of declaring. There is no doubt but that the plaintiff might have recovered, by bringing his action on the ſpecial contract, and laying the breach for the non-delivery of a bill at the end of the three months. But the queſtion is, whether he has not alſo this remedy? and if it were not for the authority of the caſe cited before Mr. J. *Chambre*, whoſe opinion is entitled to great weight, I ſhould have thought that this was an abſolute agreement for a credit of three months, with a ſtipulation on behalf of the defendant, that, at the end of the three months, he ſhould be at liberty to give the plaintiff a bill at two months for payment, which was to be taken as ſuch, if the condition were performed; and ſuch it is always conſidered in that part of the country. But ſtill the bargain between the parties was for a credit of three months; that was the leaning of my mind before I heard of the deciſion of the learned Judge, which has been relied on; and ſo I muſt own it is, in ſome degree, ſtill. And I think the plaintiff's argument was well illuſtrated by the caſe put of a man taking in payment for goods a bill drawn by the vendee on another, payable at a future time. There, if the bill be diſhonoured, it is in common experience that the payee may bring his action immediately; and yet, taking the whole tranſaction together, it might as well be ſaid in that caſe that there was a credit given for ſo many months as the bill had to run; and that, before that period, the only remedy of the party was a ſpecial action on the caſe for the damage, by reaſon of the diſhonouring of the bill. But no ſuch action has ever been brought, though the occaſion muſt have often occurred. Whatever reſpect, therefore, I feel for the opinion which has

been cited, the preſent feeling of my mind is, that this action is well brought."

Groſe, J. "This action is not brought upon an expreſs *aſſumpſit* between the parties, but upon an *aſſumpſit* implied in law. Then how does the caſe ſtand? Two perſons agree on what terms the one will buy and the other ſell certain goods. The ſeller offers them at a certain price; but the buyer ſays that he cannot pay for them at once, but that at the end of three months he will give his bill, payable at two months. The ſeller aſſents to this offer, becauſe, at the end of three months time, he expects to have a bill which he can negotiate, and thereby raiſe money. This, then, is no implied contract, whereon to raiſe an *implied aſſumpſit*, but an *expreſs contract*, including the terms on which the one agreed to buy, and the other to ſell, for the non-performance of which the party has his remedy in damages. The action then ought to have been brought for the not giving the bill, which the defendant had undertaken to do, and not for goods ſold and delivered, in which caſe the promiſe is to be implied from the circumſtances of the caſe. But this is not the caſe of an *implied*, but of an *expreſs* promiſe."

Lawrence, J. "I am of the ſame opinion. The proper ground of action is the non-performance by the defendant of his agreement with the plaintiff. That agreement was, that the defendant ſhould pay for the cotton in a particular way, namely, that at the expiration of three months, he ſhould give the plantiff his bill, payable at two months. Then how was the contract broken? By not giving at the end of three months his bill of two months; for which breach of contract the remedy lies in damages. That therefore was the mode in which the action ſhould have been brought, in which action the plaintiff would have recovered damages againſt the defendant, for his not having given the bill; ſuch as the loſs of intereſt, &c. and the action ſhould not have been on a promiſe to pay the value of the goods before the expiration of the credit. The argument for the plaintiff goes upon an aſſumption that the giving of the bill was a condition upon which the credit was to be extended beyond the three months; but I ſee no condition in the contract. If it had been, that if, at the end of three months, the defendant could give a bill at two months, the plaintiff ſhould take that in payment, there might have been ſome

foundation for the argument; but there are no words of condition. The giving of the bill at two months was a term introduced into the contract for the benefit of the seller, that at the end of three months he might have in his hands an instrument which he could negotiate. If the credit had been given generally for the whole five months, he would have been out of cash all the time: but he was to give the defendant the benefit of five months' credit, while he had only the disadvantage of giving it for three months. As to the case put of a bill payable at a future day given for payment, upon which, if dishonoured, the drawer may be immediately sued, I think a good answer was given to it at the bar. If there were no agreement for time, the party takes it as payment: and therefore, if it turn out to be good for nothing, the creditor has not received that which the other undertook to give him, and may therefore pursue his remedy immediately."

Le Blanc, J. "I think this action was brought before the time for which I consider that credit was given to the defendant. Here is an express promise proved between the parties. The seller was to stand upon the credit of the defendant alone for three months, and then he was to have in addition a third person's credit for two months longer; so that, altogether, the defendant was to have credit for five months before he was called upon to pay. But he will not have the benefit of his contract if he be called upon for the full sum before the expiration of the five months' credit. The cases alluded to, and which have only occurred at *nisi prius*, have been where goods have been sold, and a bill taken in payment, payable at a future day, but without any express contract for time for the payment of the goods; and thereupon the bill being dishonoured, the drawer has been sued immediately. But I should think, even in those cases, if the jury found that the agreement really was for time, the same objection might be made to the action as in this case. In general, however, the goods are considered as sold for a ready money price, only the seller takes a bill as ready money payment. In this view of the case I think the present action is not maintainable; and that the plaintiff should have been nonsuited: and in all cases, without express authority to the contrary, it is better to keep the forms of action as distinct as possible, instead of running one into another."

If,

If, however, the goods are not paid for at the end of the *five* months, the vendor may recover the price of them in an action of *indebitatus aſſumpſit* for goods ſold and delivered (*c*) And when goods are ſold without any agreement as to the time or mode of payment, and there is no cuſtom to regulate the time of payment; if the vendee give a bill, drawn on a third perſon, payable at a future day, for the amount of the goods, but upon preſentment of the bill for acceptance it is diſhonoured, the vendor may immediately ſue the vendee for the price of the goods, and conſider the bill as a nullity. (*d*) But if there be an expreſs contract for time, and a bill is given as a ſecurity, the vendor muſt wait the full time of credit, though the bill ſhould be previouſly diſhonoured, or the vendee become inſolvent.

So, if goods are ſold upon a contract that they ſhall be paid for by a bill to be drawn at a future day, payable at ſo many months' date, the vendor muſt draw the bill, and tender it to the vendee for acceptance, though the latter may have diſhonoured ſeveral of his acceptances between the time of the ſale, and the period at which the bill is to be drawn.

Thus, in the caſe of *Reed* v. *Meſtaer*, (*e*) which was an action of *aſſumpſit* for breach of promiſe in not giving a bill under the following written agreement:

"Agreed on the 15th *October*, 1802, with *Peter Everitt Meſtaer*, "Eſq., for one hundred tons of cordage at 56*l. per ton*, the "date to commence from that day, and to be paid by bill at "twelve months from the 15th *October*, 1803, with intereſt "added."

(Signed) "*Sb. Reed.*"

The declaration contained ſeveral ſpecial counts upon the above agreement for not giving the bill; and alſo common counts for goods ſold and delivered.

Upon the trial of the cauſe, the counſel for the plaintiff abandoned the ſpecial counts, and did not produce the agreement,

(*c*) *Vide* Brook *and others* v. White, 1 *New Rep C. B.* 330.
(*d*) *Vide* Owenſon v. Morſe, 7 *Term Rep.* 64. Puckford v. Maxwell, 6 *Term Rep.* 52. 4 *Eaſt Rep.* 153.
(*e*) *At Guildhall Sitt. aft. Hil. Term*, 1804, *coram Lord* Ellenborough, *Bb. J. M.S.S.*

but merely proved the delivery of the cordage, the bill of parcels, and the value. But the counsel for the defendant called a witness, who proved the above agreement, and that the defendant was ready, and had offered to accept a bill on the 15th of *October*, 1803, to be drawn by the plaintiff upon the defendant for the one hundred tons of cordage; that the plaintiff refused to take the defendant's acceptance, because he had previously dishonoured several of his bills; but was ready to take the acceptance of some other person to the plaintiff's satisfaction.

The cause was tried before a special jury of merchants; and, as soon as the agreement was read, the jury declared, that they were all of opinion, that by the course of dealing among merchants, upon such an agreement, the bill ought to have been drawn by the seller upon the buyer, and by him accepted; and not that the defendant should tender a bill accepted by another person to the plaintiff's satisfaction as contended for by the counsel for the plaintiff.

Lord *Ellenborough*, Ch. J. said, that under this agreement it was certainly a question for the jury to say what sort of bill was understood between the parties. The plaintiff was therefore nonsuited.

6. *Of Goods Bargained and Sold, but not Delivered.*

A bargain and sale is, where a man makes a contract with another for the sale of goods or chattels, lands or tenements, and at the same time makes the sale of them. (*f*)

When the bargain and sale is complete, and by the contract the money is to be paid before the delivery of the goods sold; or if there be no agreement as to the time of payment, and the vendee refuses to take away or accept the goods, in either case the vendor may recover the price agreed upon by action of *indebitatus assumpsit* for goods bargained and sold. (*g*)

(*f*) *Com. Dig. tit.* Bargain and Sale, *A.*

(*g*) *Vide Slade's case*, 4 *Co* 93. Knight *v.* Hopper, *Skin.* 647. *Holt's Rep.* 94. *S. C. Shep. Touch.* 225. Dunmore *v.* Taylor, *Peake's Cas. N. P.* 41.

After

After a regular ſale, without delivery, the property is ſaid (*b*) to be ſo abſolutely veſted in the vendee, that if *A.* ſells a horſe to *B.* for 10*l.*, and *B.* pays him earneſt, or ſigns a note in writing of the bargain; and afterwards, before the delivery of the horſe, or money paid, the horſe dies in the vendor's cuſtody, ſtill he is entitled to the money, becauſe by the contract, the property was in the vendee.

7. *Of Goods, Sold and Delivered; and what ſhall be deemed a ſufficient Delivery.*

If *A.* promiſe *B.* 20*l.* on delivery of twenty quarters of corn by him; and *B.* delivers ten quarters, he ſhall not have an action for the 20*l.* before he has delivered all. (*i*)

So, in the caſe of *Goodall* v. *Skelton*, (*k*) which was an action of *indebitatus aſſumpſit* for goods ſold and delivered: the facts were as follow: "That the plaintiff had agreed to ſell a quantity of wool to the defendant, that a ſhilling earneſt was paid on the part of the defendant to bind the bargain; that the wool was packed in cloths furniſhed by the defendant for that purpoſe, and left at a hovel belonging to the plaintiff; and that the defendant was to ſend his waggon in a few days to take it away. But while the defendant's ſervant was weighing and packing it, and propoſing to the plaintiff to fix the time when the waggon ſhould come, the plaintiff declared that the wool ſhould not go off his premiſes till he had the money for it."

The court determined, that the action could not be maintained. And *Buller*, J. ſaid: "In general, in queſtions of this ſort, the uſage of trade is reſorted to in order to ſhow whether there has been a delivery or not: as in the caſe of wharfs and the like. But here the evidence is, that the plaintiff peremptorily inſiſted on not parting with the goods till he was paid: clearly therefore there was no delivery."

But if a tradeſman order goods to be ſent by a carrier, though he does not name any particular carrier, the moment the goods

(*b*) *Noy's Max. Ch.* 42. 2 *Vl. Com.* 448. *Et vide ante*, 210.
(*i*) *Per* Cur. *Ch. J.* 3 *Buſſ.* 325. *Et vide ante* 223.
(*k*) 2 *H. Bl.* 316.

are delivered to the carrier it operates as a delivery to the purchaſer; the whole property immediately veſts in him; he alone can bring an action for any injury done to the goods; and if any accident happens to the goods it is at his riſk. The only exception to the purchaſer's right over the goods is, that the vendor in caſe of the former becoming inſolvent may ſtop them *in tranſitu*. (*l*)

So where the vendee orders the goods to be ſent by any particular mode of conveyance, he is liable to pay for them upon the delivery thereof to the carrier.

Thus, in the caſe of *Vale* v. *Bayle*, (*m*) which was an action of *aſſumpſit* for goods ſold and delivered. At the trial, before *Aſhburſt*, J., a letter from the defendant to the plaintiff was produced, containing a commiſſion to the plaintiff for the goods in queſtion, after which was added the following poſtcript; "Pray "be expeditious in ſending them; and inſtead of letting them "go by the way of *Briſtol*, where many things you have ſent "me have been detained, ſend them by land carriage." The witneſs proved the delivery of the goods to the book-keeper of the *Birmingham* carrier, to be ſent from thence by way of *Coventry*, to the defendant, who lived at *Carmarthen*. It appeared there was no other mode of conveyance by land carriage, and the goods were loſt on the road. Upon this evidence it was inſiſted, that the delivery of the goods to the carrier was a delivery to the defendant; the learned judge, however, being of a different opinion directed a nonſuit. But upon a rule to ſhow cauſe why the nonſuit ſhould not be ſet aſide, and a new trial granted, the Court granted the rule, being of opinion that the delivery to the carrier was a delivery to the defendant.

Lord *Manſfield*, Ch. J. ſaid: "I have a difficulty to find a queſtion in this caſe; for it reſolves itſelf into this ſhort point; *viz.*, whether, in a diſpute between vendor and vendee, the vendor is excuſed from delivering goods according to the order of the vendee?"

His lordſhip, after ſtating the caſe, ſaid, "the material part of the letter is as follows: 'I beg you will ſend them by land 'carriage, as they are detained a long time at *Briſtol* before they

(*l*) *Per Lord* Alvanley, 3 *Bos. & Pul.* 584. (*m*) *Cowp.* 294. *See alſo* Dawes v. Peck, 8 *Term Rep.* 330. *and* 3 *P. Wms.* 186. *S. P.*

'arrive.'

'arrive.' This is an expreſs order to ſend the goods by land carriage. The plaintiff, in obedience to this order, ſends them up accordingly, and they are delivered to the book-keeper of the *Birmingham* carrier at the warehouſe in *Coventry*, to be forwarded to the defendant at *Carmarthen*. The box was loſt, and the witneſs ſaid, that before this time his maſter had always ſent goods to the defendant by the way of *Briſtol*, and that there was no other mode of ſending them, by land carriage, than by way of *Birmingham*. There was no evidence in contradiction to this. Then what is the caſe? It is as much as if the defendant had mentioned the *Birmingham* carrier particularly by name; for there being but one carrier, the plaintiff had no choice by whom to ſend them. If a vendor take upon himſelf actually to deliver the goods to the vendee, he ſtands all the riſks; but if the vendee order a particular mode of conveyance, the vendor is excuſed.

With regard to the queſtion between a vendor and the general creditors of a vendee, who becomes a bankrupt, a vendor, before actual poſſeſſion by the vendee, has a lien upon the goods he ſends; and if he can get them in *tranſitu*, to be ſure he has the benefit of that lien. But that has no relation to a tranſaction, as this is, between vendor and vendee. Therefore I am of opinion, that the rule for ſetting aſide the nonſuit ſhould be made abſolute, and a new trial granted."

So, in the caſe of *Cooke* v. *Ludlow*, (*n*) which was alſo an action of *aſſumpſit*, for goods ſold and delivered, and goods bargained and ſold. At the trial a verdict was found for the plaintiff, damages 12*l.* 6*s.* 6*d.* ſubject to the opinion of the Court of *Common Pleas* upon the following caſe: "On the 23d of *November*, 1802, the plaintiffs, who were partners and agricultural implement makers, received a letter by the poſt from the defendant, dated *Winterbourne Court* near *Briſtol*, in which he writes: "Three or four years ſince I had a patent chaff-cutter of you, which for ſome time anſwered my purpoſe very well, but it is latterly got out of order. I therefore beg the favour to ſend me another as ſoon as you can after you receive this, as I am in the habit of uſing a great deal of chaff: you will be ſo good as to ſend two or three pair of knives. Any conveyance

(*n*) 2 *New Rep. C. B.* 119.

by

by which it will reach *Briſtol* will be convenient to me, as I am only ſix miles from it. I am," &c. And in a poſtcript to that letter the defendant writes: "I will thank you for a line mentioning when you ſend the chaff-cutter, that I may know when to expect it, and where to ſend for it; and the ſooner I can get it the more agreeable, as I am much inconvenienced for want of chaff." On the 17th *December* following the plaintiffs ſent the chaff-cutter and knives, directed to the defendant, to *Symond's Wharf, Tooley Street*, at which wharf ſome of the *Briſtol* veſſels load, and received from the wharfingers there a receipt of the ſame in following words: 'The *Commerce, Cha. Farquarſon*, for *Briſtol*, 17th *December*, received 1*s.* 6*d. J. M.*' On the ſame 17th *December* the plaintiffs, *per poſt*, adviſed the defendant as follows: 'The *Commerce* ſailed from the port of *London* in *January*, 1803, to *Briſtol*, and arrived there, and *Pollard* and *Son* are agents to all *Briſtol* veſſels loaden at *Symond's Wharf* for *Briſtol*, and receive all the goods arriving by them.' From the month of *January*, 1803, until the arrival of the *Commerce* at *Briſtol* the defendant made continual inquiries of the agents and conſignees at *Briſtol* if ſhe had brought the chaff-cutter in queſtion. The package containing the chaff-cutter was not on board this veſſel on its arrival at *Briſtol*. It is the invariable cuſtom at *Symond's*, and other wharfs, when goods are left there to go to any place by a veſſel, to give a receipt for the goods as going by the veſſel then loading, without regard to the capability of the veſſel loading to contain all the articles for which receipts are given; and if there are more goods than ſuch veſſel will contain, to load ſuch goods, as cannot be conveyed in ſuch veſſel, on board the next veſſel in turn that ſails from the wharf. The *Commerce* was the veſſel loading at the wharf at the time the chaff-cutter was delivered to the wharfinger, but ſuch veſſel was fully loaded with other goods in turn which came there before the chaff-cutter, ſo that the chaff-cutter, and other goods delivered at the ſame time, to be ſent to *Briſtol*, were left out of that veſſel, and were afterwards by the wharfinger put on board another veſſel called the *Nancy*, which ſailed from *Symond's Wharf* on the 13th *April*, 1803, for *Briſtol*, and duly arrived at *Pollard's Wharf* with the chaff-cutter on board. The chaff-cutter was landed from the *Nancy* at *Pollard's Wharf, Briſtol*, and ſtill remains there. The wharfinger did not give notice either to the conſignor or to the conſignee, that the chaff-cutter had not been taken

taken on board the *Commerce*, or that it had been ſent by any other ſhip. No correſpondence or communication whatever paſſed between the parties until about the middle of the following year, (1804,) when the plaintiffs applied for payment of their demand, and in a ſhort time afterwards, *viz.*, on the 20th *July*, in that year, received a letter from the defendant, ſtating that he had not received any chaff-cutter whatſoever, though he had made repeated inquiries at *Pollard*'s *Wharf* for the ſame, from the receipt of the plaintiffs' invoice until the arrival of the *Commerce* at *Briſtol* without the chaff-cutter, and therefore had got his old one repaired. On the 22d of *November*, 1804, the plaintiffs wrote to the defendant, ſtating that they would not agree to ſuſtain any loſs, and informing him that by inquiry made that morning at *Symond*'s *Wharf*, they found that the chaff-cutter was not forwarded by the *Commerce*, but was put on board the *Nancy* which left *London* on the 13th *April*, 1803; and that *Pollard* and *Son*, on the quay at *Briſtol*, were the agents for that ſhip. This was the firſt intimation which the defendant received from the plaintiffs that the chaff-cutter had been ſent by the *Nancy*." The queſtion for the opinion of the Court of *Common Pleas* was, whether the plaintiffs were entitled to recover. Sir *James Mansfield*, Ch. J. ſaid: "This queſtion does not depend upon the liability of particular perſons to anſwer for the miſconduct of the wharfinger. For it does not appear that any neglect is imputable to the wharfinger for not ſending the goods by the *Commerce*. The ſingle queſtion is, whether the plaintiffs has reaſonably complied with the order ſent to him by the defendant; and whether it be owing to the fault of the plaintiff or the defendant that the goods were not received, if the fault be imputable to the latter, he muſt pay the former the value of the goods. The defendant in his letter of the 23d of *November*, 1802, ſays, 'Any conveyance by which it will reach *Briſtol* will be convenient; and deſires to be informed when the chaff-cutter is ſent, that he may know when to expect it, and where to ſend for it.' The chaff-cutter being a heavy inſtrument was ſent by water, and the defendant could hardly ſuppoſe that it would be ſent by land. On the 17th of *December* the plaintiffs write to inform the defendant that it is ſent by the *Commerce*. The *Commerce* ſailed in *January*, and after her arival at *Briſtol* the defendant made frequent inquiries at *Pollard*'s *Wharf*, from which he found that the chaff-cutter did not arrive by the *Commerce*. Under theſe circumſtances he

he remains in perfect silence, and never informs the plaintiffs until the 20th *July*, 1804, that it had not arrived. What then were the plaintiffs to conclude? They had sent it by the proper conveyance to *Bristol*, and had written to the defendant to tell him so. They must therefore suppose either that it had been received, or that they would have had information to the contrary. If the defendant had informed the plaintiffs that the chaff-cutter had not arrived by the *Commerce*, they might have inquired at the wharf and remedied the mistake; instead of this he leaves them in ignorance, and under the supposition that it had been received; and it is not until application is made for payment in *July*, 1804, that he gives any intelligence of the non-arrival of the article. In whom then is the fault? Not in the plaintiffs. They sent the chaff-cutter to the wharf, and gave notice to the defendant. The ship, however, being full the chaff-cutter does not go by that ship, but, according to all custom, goes by the next to the same port, and the defendant having information that it has been sent, does not acquaint the plaintiffs of its non-arrival till a year and a half afterwards. If it had never arrived at all, it is very questionable whether the defendant would not have been liable to pay for it, because it was his duty immediately to inform the plaintiffs of its non-arrival. The article was sent in the common course, and it was the defendant's own fault that he had it not. There is nothing to blame in the conduct of the plaintiffs; they sent the chaff-cutter according to order, and it was the fault of the defendant not to give notice in due time that he had not received it."

Heath, J. said: "It is not necessary to add much. I do not consider the wharfinger as in any degree the agent of the plaintiffs; he is the agent of the defendant by whose order and direction the goods were sent. No negligence is imputable to the plaintiffs in not inquiring after the goods. They had no notice of the non-delivery until *July*, 1804. Nothing is more common than in the case of waggons, where one is full, to send the goods by the next." The other judges concurring, judgment was given for the plaintiffs. *

* *For what shall be deemed a sufficient delivery to satisfy the requisitions of of the statute of frauds.* Vide *ante*, *Vol* 1. *c.* 4. *s.* 6.

8. Of

8. *Of Goods Sold to One, and Delivered, at his Requeſt, to a third Perſon.*

It is ſaid, (*o*) if two come to a draper, and one of them ſays, let this perſon have ſo much cloth, and I'll ſee you paid; there the ſale is to him only who gives the order, though the delivery be to another by his appointment, and he alone is liable. But if a contract be made with *A.*, and the vendor ſcruples to let the goods go without the money, and *B.* comes to him, and deſires him to let *A.* have the goods, and undertakes that *A.* ſhall pay him; in this caſe *A.* is the original debtor, and *B.* is only anſwerable upon his promiſe, (which, by the ſtatute of frauds, 29 *Car.* 2. c. 3. muſt be reduced into writing,) in caſe *A.* makes default in payment. (*p*)

So, if a tradeſman delivers goods to *A.*, at the requeſt and credit of *B.*, who ſays, before the delivery, "I will be bound for the payment of the money as far as 800*l.* or 1000*l.*" This promiſe of *B.*, not being in writing, is void by the ſtatute of frauds, if it appear that credit was given to *A.* as well as *B.*

Thus, in the caſe of *Anderſon* v. *Hayman*, (*q*) which was an action of *aſſumpſit* for the amount of certain goods delivered to the defendant's ſon. The facts were theſe: The plaintiff was a wollen draper in *London*, and employed one *Biffin* as a rider, to receive orders from his cuſtomers in the country. The defendant meeting with *Biffin* at *Deal*, deſired him to write to the plaintiff, requeſting him to ſupply the defendant's ſon, (who traded to the *Weſt Indies*,) with whatever goods he might want, on his, the defendant's, credit, and at the ſame time ſaid, "Uſe my ſon well, charge him as low as poſſible, and I will be "bound for the payment as far as 800 or 1000*l.*" *Biffin* accordingly wrote to the plaintiff the following letter: "Mr. *Hay-*"*man*, of this town, ſays his ſon will call on you and leave orders, "and he has promiſed me to ſee you paid, if it amounts to a "1000*l.* Mr. *William Pitchers* was alſo preſent as a witneſs.

(*o*) *Per Curiam*, 6 *Mod.* 240. 12 *Mod.* 250.
(*p*) *Vide* 12 *Mod.* 250. 2 *Vent.* 36. (*q*) 1 *H. Bl.* 120.

"N.B.

" N.B. If deal for twelve months credit, and pay in ſix or " eight months, expects diſcount in proportion." Soon after the ſon received goods from the plaintiff to the amount of 800*l.*, which were delivered to him in conſequence of the above-written order from the father. The ſon was debited in the plaintiff's books and being applied to for payment, wrote an anſwer to the plaintiff as follows:

" Your favour of the 27th paſt has been forwarded to me " from *Oſtend* by my clerk, in anſwer to which I can only ſay, " that I underſtood your credit for the goods was twelve months, " which was alſo mentioned by your rider to my father, I ſhall " at this rate make you remittances for the different parcels as " they become due, and remain, &c.

" *Thomas Hayman*, Junior."

The ſon afterwards became a bankrupt, and this action was brought againſt the father, to recover the value of the goods.

Mr. Juſtice *Heath*, before whom the cauſe was tried, directed the jury to conſider whether the plaintiff gave credit, to the defendant alone, or to him together with his ſon; that in the former caſe they ſhould find a verdict for the plaintiff, in the latter for the defendant; being of opinion, that if any credit was given to the ſon, the promiſe of the defendant, not being in writing, was void by the ſtatute of frauds. A verdict was found for the defendant.

A rule, however, was obtained to ſhow cauſe why the verdict ſhould not be ſet aſide, and a new trial granted, upon the ground that the original credit was given to the defendant, and that his undertaking was not collateral.

But, the court were clearly of opinion, that the defendant's promiſe, not being in writing, was void by the ſtatute of frauds, as it appeared from the evidence of the letter of *Hayman* the younger, that credit was given to him, as well as to the defendant.*

* *For more concerning the ſtatute of frauds relating to collateral undertakings, &c. vide ante, Vol.* 1. *c.* 4. *ſ.* 2.

9. *Of the Sale of Contraband Goods, or Obſcene and Libellous Prints, &c.*

Contraband goods are ſuch as are prohibited by Act of Parliament, or the King's proclamation, either to be imported into, or exported out of this country.

And if any contract for the ſale of goods of this deſcription be made in *this country* it is void, and no action will lie thereon: but where the contract and delivery of goods are complete abroad, and the ſeller does no act to aſſiſt the ſmuggling them into this country, ſuch a contract is valid, and may be recovered upon here.

Thus, in the caſe of *Holman* and others v. *Johnſon*, (*r*) which was an action of *aſſumpſit* for goods ſold and delivered; at the trial a verdict was found for the plaintiff. But upon a rule to ſhow cauſe why a new trial ſhould not be granted, Lord *Mansfield* reported the caſe, which was ſhortly this: "The plaintiff, who was reſident at, and an inhabitant of *Dunkirk*, together with his partner, a native of that place, ſold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be ſmuggled by him into *England*: they had, however, no concern in the ſmuggling ſcheme itſelf, but merely ſold his tea as they would have done to any other perſon in the common and ordinary courſe of their trade."

In ſupport of the rule it was inſiſted, that the contract for the ſale of this tea being founded upon an intention to make an illicit uſe of it, which intention and purpoſe was with the privity and knowledge of the plaintiff, he was not entitled to the aſſiſtance of the laws of this country to recover the value of it. He cited *Huberus*, 2 Vol. 538, 539. and *Robinſon* v. *Bland* to ſhow that the contract muſt be judged of by the laws of this country, and conſequently that an action for the price of the tea could not be ſupported here.

But the Court determined, that as the ſale and delivery was complete at *Dunkirk*, and there was no evidence to ſhow that the

(*r*) *Cowp.* 341.

plaintiff

plaintiff had any concern in running the tea into *England*, he was entitled to recover.

Lord *Mansfield*, Ch. J. said: "There can be no doubt but that every action tried here must be tried by the law of *England*; but the law of *England* says, that in a variety of instances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern. There are a great many cases which every country says, shall be determined by the laws of foreign countries where they arise. But I do not know how the principles, on which that doctrine obtains, are applicable to the present case. For no country ever takes notice of the revenue laws of another.

The objection that a contract is immoral or illegal, as between plaintiff or defendant, sound, at all times, very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the court says, he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change side, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*

The question therefore is, whether, in this case, the plaintiff's demand is founded upon the ground of any immoral act or contract, or upon the ground of his being guilty of any thing which is prohibited by a positive law of this country. An immoral contract it certainly is not; for the revenue laws themselves, as well as the offences against them, are all *positivi juris.* What then is the contract of the plaintiff? It is this: being a resident and inhabitant of *Dunkirk*, together with his partner, who was born there, he sells a quantity of tea to the defendant, and delivers it at *Dunkirk*, to the defendant's order, to be paid for

in

in ready money there, or by bill drawn perſonally upon him in *England*. This is an action brought merely for goods ſold and delivered at *Dunkirk*. Where then, or in what reſpect is the plaintiff guilty of any crime? Is there any law of *England* tranſgreſſed by a perſon making a complete ſale of a parcel of goods at *Dunkirk*, and giving credit for them? The contract is complete, and nothing is left to be done. The ſeller, indeed, knows what the buyer is going to do with the goods, but has no concern in the tranſaction itſelf. It is not a bargain to be paid in caſe the vendee ſhould ſucceed in landing the goods; but the intereſt of the vendor is totally at an end, and his contract complete by the delivery of the goods at *Dunkirk*.

To what a dangerous extent would this go if it was to be held a crime. If contraband cloths are bought in *France*, and brought home hither; or if glaſs bought abroad, which ought to pay a great duty, is run into *England*? ſhall the *French* taylor, or the glaſs manufacturer ſtand to the riſk or loſs attending their being run into *England*? Clearly not. Debt follows the perſon, and may be recovered in *England*, let the contract of debt be made where it will; and the law allows a fiction for the ſake of expediting the remedy. Therefore I am clearly of opinion, that the vendors of theſe goods are not guilty of any offence, nor have they tranſgreſſed againſt the proviſions of any Act of Parliament.

I am very glad the old books have been looked into. The doctrine *Huberus* lays down is founded upon good ſenſe, and upon general principles of juſtice. I entirely agree with him. He puts the very caſe in queſtion thus: *Tit de conflictu legum*, vol. 2. page 539. "*In certo loco merces quædam prohibitæ ſunt. Si ven-* nullus
"*dantur ibi, contractus eſt, nullus. Verum, ſi merx eadem alibi ſit*
"*vendita, ubi non erat interdicta, emptor condemnabitur, quia con-*
"*tractus inde ab initio validus fuit.*" Tranſlated it might be rendered thus: In *England* tea, which has not paid duty, is prohibited, and if ſold there, the contract is null and void. But if ſold and delivered at a place where it is not prohibited, as at *Dunkirk*, and an action is brought for the price of it in *England*, the buyer ſhall be condemned to pay the price; becauſe the original contract was good and valid. He goes on thus: "*Verum*
"*ſi merces venditæ in altero loco, ubi prohibitæ ſunt eſſent tradendæ,*
"*jam non fieret condemnatio quia repugnaret hoc juri et commodo*
"*reipublicæ quæ merces prohibuit.*" Apply this in the ſame man-

ner. But if the goods ſold were to be delivered in *England*, where they are prohibited, the contract is void, and the buyer ſhall not be liable in an action for the price, becauſe it would be an inconvenience and prejudice to the ſtate if ſuch an action could be maintained.

The gift of the whole turns upon this, that the concluſive delivery was at *Dunkirk*. If the defendant had beſpoke the tea at *Dunkirk* to be ſent to *England* at a certain price; and the plaintiff had undertaken to ſend it into *England*, or had had any concern in the running it into *England*; he would have been an offender againſt the laws of this country. But upon the facts of the caſe, from the firſt to the laſt, he clearly has offended againſt no law of *England*."

But, if a vendor of goods abroad knows, at the time of the ſale and delivery, that the goods are to be ſmuggled into this country, and gives his aſſiſtance to the vendee, by packing them in a particular manner for ſmuggling, with intent to aid that purpoſe, he cannot recover the value of the goods ſold, even though he be a *foreigner* reſident abroad.

Thus, in the caſe of *Waymell* v. *Reed* and another, (*s*) which was an action of *aſſumpſit* for goods ſold and delivered; the defence was, that the contract was a ſmuggling tranſaction: And it appeared in evidence that the defendants had applied to the plaintiff, who was a foreigner living at *Liſle*, for a quantity of lace, which he knew was intended to be ſmuggled into *England*; and for that purpoſe it was packed by the plaintiff in a peculiar manner, by the direction of the defendants, for the more eaſy conveyance of it without a diſcovery. A verdict was taken for the plaintiff, ſubject to be ſet aſide, and a nonſuit entered, if the Court of *King's Bench* ſhould be of opinion that the plaintiff was not entitled to recover under theſe circumſtances.

A rule having been obtained for that purpoſe, the counſel for the plaintiff ſhowed cauſe, and contended that the bare circumſtance of knowledge that the goods were to be ſmuggled could furniſh no ground of objection againſt the plaintiff, who was a foreigner reſiding abroad, and who, not owing any allegiance to this country, was not bound by any moral or political ties to take

(*s*) 5 *Term Rep.* 599. *See alſo* Clugas v. Penaluna, 4 *Term Rep.* 466. *S. P.*

cognizance

cognizance of its revenue laws. And they relied upon the caſe of *Holman* v. *Johnſon*, * as eſtabliſhing the diſtinction they inſiſted upon. As to the circumſtance of the plaintiff having aſſiſted in packing the goods in a particular manner, it was done in conſequence of the ſpecial orders of the defendants, the buyers, whoſe directions, in that reſpect it was their buſineſs to obey; but that cannot vary the caſe, unleſs they aſſiſted in tranſporting the goods into this country.

But the Court determined, that the plaintiff could not, under the circumſtances, recover for the goods ſold. And Lord *Kenyon*, Ch. J. ſaid: "It is not neceſſary to inquire now whether or not it be immoral for the native of one country to enter into a contract with the ſubject of another to aſſiſt the latter in defrauding the revenue laws of his country. It is ſufficient, in order to diſpoſe of this caſe, to advert to the diſtinction laid down by Lord *Mansfield* in *Holman* v. *Johnſon*, to which I entirely ſubſcribe, that where the contract and delivery of goods are complete abroad, and the ſeller does no act to aſſiſt the ſmuggling them into this country, ſuch a contract is valid, and may be recovered upon here. But here the plaintiff was concerned in giving aſſiſtance to the defendants to ſmuggle the goods, by packing them in the manner moſt ſuitable for, and with intent to aid that purpoſe. He cannot therefore reſort to the laws of this country to aſſiſt him in carrying his contract into execution. What was ſaid by Lord *Mansfield* at the end of *Holman* v. *Johnſon* comes up to the preſent caſe."

Buller, J. "In *Holman* v. *Johnſon*, the ſeller did not aſſiſt the buyer in ſmuggling; he merely ſold the goods in the common and ordinary courſe of trade. But this caſe does not reſt merely on the circumſtance of the plaintiff's knowledge of the uſe intended to be made of the goods; for he actually aſſiſted the defendants in the act of ſmuggling, by packing the goods up in a manner moſt convenient for that purpoſe. And if he undertook to deliver the goods in that manner, knowing the uſe intended to be made of them, he was offending againſt the laws of this country in the very contract itſelf."

So, in the caſe of *Biggs* and others v. *Lawrence*, (*t*) it was determined, that an action cannot be maintained by ſeveral partners

* *Ante*, 239. (*t*) 3 *Term Rep.* 454.

for goods ſold by one of them living at *Guernſey*, and packed by him in a particular manner for the purpoſe of ſmuggling, though the other partners, who reſided in *England*, knew nothing of the ſale, for it is a contract by ſubjects of this country made in contravention of the laws: and this caſe muſt be conſidered in the ſame light as if all the partners lived in *England*.

Of the Sale of Obſcene or Libellous Prints.] No action will lie upon a contract for the ſale of prints of an obſcene, immoral, or libellous tendency.

Thus, in the caſe of *Fores* v. *Johnes*, (*v*) which was an action of *aſſumpſit* for prints ſold and delivered. The plaintiff was a printſeller in *Piccadilly*; and the action was brought to recover the value of a quantity a of caricature prints, ſold by him to the defendant.

The order, as proved to have been given by the defendant to the plaintiff, was, "For all the caricature prints that had ever been "publiſhed." Under this order, the prints in queſtion, had been ſent to the defendant's houſe in *Wales*.

The defendant refuſed to receive them, on the ground, that the collection contained ſeveral prints of obſcene and immoral ſubjects; excluſive of ſeveral being duplicates.

The plaintiff's counſel contended, that the order was general and comprehenſive, without any exception as to the ſubject; and that the plaintiff, therefore, having ſent prints of every deſcription was entitled to be paid for them. *Sed, per Lawrence*, J. "For prints, whoſe objects are general ſatire or ridicule of prevailing faſhions or manners, I think the plaintiff may recover; but I cannot permit him to do ſo for ſuch whoſe tendency is immoral or obſcence; nor for ſuch as are libels on individuals, and for which the plaintiff might have been rendered criminally anſwerable for a libel."

(*v*) 4 *Eſp. Rep.* 97.

CHAPTER

CHAPTER VII.

Of Contracts to Accept or Transfer Stock.

IN order to prevent the pernicious and deſtructive practice of ſtock-jobbing, and to regulate contracts made for accepting and transferring ſtock, an Act of Parliament was paſſed, very early in the reign of the late king, (*a*) intitled, "An Act to pre-"vent the infamous practice of ſtock-jobbing," which, after reciting "Whereas great inconveniences have ariſen, and do daily ariſe by the wicked, pernicious, and deſtructive practice of ſtock-jobbing, whereby many of his Majeſty's good ſubjects have been and are diverted from purſuing and exerciſing their lawful trades and vocations, to the utter ruin of themſelves and families, to the great diſcouragement of induſtry, and to the manifeſt detriment of trade and commerce: for remedy thereof, it is enacted, "That all contracts and agreements whatſoever which ſhall be made or entered into by or between any perſon or perſons whatſoever, upon which any premium, or conſideration in the nature of a premium, ſhall be given or paid for liberty to put upon, or deliver, receive, accept, or refuſe any public or joint ſtock, or other public ſecurities whatſoever, or any part, ſhare, or intereſt therein, and alſo all wagers, and contracts in the nature of wagers, and all contracts in the nature of putts, and refuſals, relating to the then preſent or future price, or value, of any ſuch ſtock or ſecurities as aforeſaid, ſhall be null and void, to all intents and purpoſes whatſoever; and all premiums, ſum, or ſums of money whatſoever, which ſhall be given, received, paid, or delivered, upon all ſuch contracts or agreements, or upon any ſuch wagers, or contracts in the nature of wagers, as aforeſaid, ſhall be reſtored

(*a*) 7 *Geo.* II. *c.* 8. *and made perpetual by* 10 *Geo.* II. *c.* 8. *This ſtatute is frequently called Sir* John Barnard's *Act; it having been brought into Parliament and framed by him.*

and repaid to the perſon or perſons who ſhall give, pay, or deliver the ſame, who ſhall be at liberty, within ſix months from and after the making ſuch contract, or agreement, or laying any ſuch wager, to ſue for and recover the ſame from the perſon or perſons to whom the ſame is or ſhall be paid, or delivered, with double coſts of ſuit, by action of *debt*, founded on this act, to be proſecuted in any of His Majeſty's courts of record, in which action no eſſoin, protection, wager of law, or more than one imparlance ſhall be allowed; and it ſhall be ſufficient therein for the plaintiff to alledge that the defendant is indebted to the plaintiff, or has received to the plaintiff's uſe the money or premium ſo paid or received, whereby the plaintiff's action accrued to him, according to the form of this ſtatute, without ſetting forth the ſpecial matter."

And for the better diſcovery of the monies, or premium, which ſhall be given, paid, or delivered, and to be ſued for and recovered as aforeſaid, it is enacted, by the ſecond ſection of the act "that all and every the perſon or perſons, who, by virtue of this preſent act, ſhall or may be liable to be ſued for the ſame, ſhall be obliged and compellable to anſwer, upon oath, ſuch bill as ſhall be preferred againſt him or them, in any court of equity, for diſcovering any ſuch contract or wager; and the ſum of money, or premium, ſo given, paid, or delivered as aforeſaid." But by ſection 3, it is provided, always, "that the plaintiffs, relators, or informers in ſuch bill ſhall and do, (at the ſame time of bringing or filing ſuch bill) give good and ſufficient ſecurity to anſwer and pay the defendants in ſuch bill full coſts of ſuit, in caſe ſuch coſts ſhall be adjudged to the defendants; and that no perſon ſhall be obliged to appear, or to anſwer ſuch bill until ſuch ſecurity is given."

By ſection 4. it is further enacted, "That all and every perſon, or perſons whatſoever, who ſhall enter into, make, or execute any ſuch contract, bargain, or agreement, upon which any premium, or conſideration in the nature of a premium, ſhall be given or paid for liberty to put upon, or to deliver, receive, accept, or refuſe any public or joint ſtock, or other public ſecurities whatſoever, or any part, ſhare, or intereſt therein, or any contract, or bargain, in the nature of putts and refuſals, as aforeſaid, or ſhall lay any ſuch wager, or make any ſuch contract in the nature of a wager, as aforeſaid, (except ſuch perſon or perſons who ſhall actually and

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bonâ fide, without covin or colluſion, ſue, and with effect proſecute for the recovery of the money or premium given, delivered, or paid by him, her, or them, as aforeſaid; and alſo except ſuch perſon, or perſons, who ſhall voluntarily, before any action or ſuit commenced, actually and *bonâ fide*, without covin or colluſion, repay or tender, before one or more witneſs, or witneſſes, ſuch money, or premium, as he, ſhe, or they ſhall have had, taken, received, or been paid, as aforeſaid, and alſo except ſuch perſon, or perſons, who ſhall diſcover ſuch tranſaction, in any court of equity,) ſhall forfeit and pay the ſum of 500*l.*; and alſo all and every brokers, agents, ſcriveners, or other perſons negotiating, tranſacting, or writing any ſuch contract, bargain, or agreement, as aforeſaid, ſhall likewiſe forfeit and pay the ſum of 500*l.*; which ſaid penalties ſhall and may be recovered by action of debt, bill, plaint, or information, in any of his Majeſty's courts of record at *Weſtminſter*, in which no eſſoin, privilege, protection, or wager of law, or more than one imparlance ſhall be allowed; one moiety thereof to the uſe of His Majeſty, his heirs, and ſucceſſors; and the other moiety thereof to the uſe of him, her, or them, who ſhall ſue for the ſame."

And for preventing the evil practice of compounding, or making up differences for ſtocks, or other ſecurities bought, ſold, or at any time hereafter to be agreed ſo to be, the 5th ſection of the act enacts, "That no money, or other conſideration whatſoever, (except as hereinafter is provided, ſhall be voluntarily given, paid, had, or received, for the compounding, ſatisfying, or making up any difference for the not transferring having or receiving any public or joint ſtock, or other public ſecurities, or for the not performing of any contract, or agreement, ſo ſtipulated and agreed to be performed; but that all and every ſuch contract and agreement ſhall be ſpecifically performed and executed on all ſides, and the ſtock or ſecurity thereby agreed to be aſſigned, transferred, or delivered, ſhall be actually ſo done, and the money or other conſideration thereby agreed to be given and paid for the ſame, ſhall alſo be actually and really given and paid; and all and every perſon and perſons whatſoever who ſhall voluntarily compound, make up, pay, ſatisfy, take, or receive ſuch difference-money, or other conſideration whatſoever, for the not delivering, transferring, aſſigning, having, or receiving ſuch ſtock, or other ſecurity, ſo to be agreed to be delivered, transferred, aſſigned, had or received, as aforeſaid (except in the manner hereinafter

inafter provided) ſhall forfeit and pay the ſum of 100*l.* to be recovered by action of debt, bill, plaint or information, in any of His Majeſty's courts of record at *Weſtminſter*, in which no eſſoin, privilege, protection, or wager of law, or more than one imparlance ſhall be allowed; one moiety thereof to the uſe of his Majeſty, his heirs and ſucceſſors, and the other moiety to the uſe of him, her, or them who ſhall ſue for the ſame."

By the 6th ſection it is provided, nevertheleſs, "That no perſon, or perſons, who ſhall ſell any public or joint ſtock, or other public ſecurities, to be delivered and paid for on a certain day, and which ſhall be refuſed or neglected to be paid for, according to ſuch agreement, ſhall be obliged to transfer the ſame: but it ſhall and may be lawful for ſuch perſon, or perſons, to ſell ſuch ſtock, or other ſecurities, which ſhall be ſo refuſed or neglected to be paid for, to any other perſon, or perſons, for the beſt price which can be obtained, and, after ſuch ſale, to receive (if the parties can agree) or to recover, as aforeſaid, from the perſon or perſons who firſt contracted for the ſame, all the damage which ſhall be ſuſtained thereby."

And by the 7th ſection it is alſo provided, "That it ſhall and may be lawful to and for any perſon, or perſons, who ſhall buy any public or joint ſtock, or other public ſecurities, to be accepted and paid for on a future day, and which ſhall be refuſed, or neglected to be transferred, to buy the like quantity of ſuch ſtock, or other public ſecurities, of any other perſon or perſons, at the current market price; and to recover and receive, after ſuch purchaſe and acceptance, (if the parties can agree) from the perſon or perſons who firſt contracted to ſell or deliver the ſame, the damage which ſhall be ſuſtained by reaſon of the not delivering or not transferring ſuch ſtock, or other ſeurities; any thing in this act, or any law, uſage, or cuſtom to the contrary notwithſtanding."

The 8th ſection of this act, after reciting, "Whereas it is a frequent and miſchievous practice for perſons to ſell and diſpoſe of ſtocks, or other ſecurities, of which they are not poſſeſſed," enacts, "That all contracts and agreements whatſoever which ſhall be made or entered into, for the buying, ſelling, aſſigning, or transferring of any public or joint ſtock, or ſtocks, or other public ſecurities whatſoever, or of any part, ſhare, or intereſt thereiñ,

therein, whereof the perſon or perſons contracting or agreeing, or on whoſe behalf the contract or agreement ſhall be made, to ſell, aſſign, and transfer the ſame, ſhall not, at the time of making ſuch contract or agreement, be actually poſſeſſed of, or entitled unto in his, her, or their own right, or in his, her, or their own name, or names, or in the name or names of a truſtee, or truſtees, to their uſe, ſhall be null and void, to all intents or purpoſes whatſoever; and all and every perſon and perſons whatſoever contracting or agreeing, or on whoſe behalf, and with whoſe conſent any contract or agreement ſhall be made to ſell, aſſign, or transfer any public or joint ſtock or ſtocks, or other public ſecurities, whereof ſuch perſon or perſons ſhall not, at the time of making ſuch contract or agreement, be actually poſſeſſed of, or entitled unto, in his, her, or their own name or names, or in the name or names of a truſtee or truſtees, to their uſe, or their own right, as aforeſaid, ſhall forfeit and pay the ſum of 500*l.* to be recovered by action of debt, as aforeſaid; one moiety thereof to the uſe of His Majeſty, and the other moiety thereof to the uſe of him, her, or them who ſhall ſue for the ſame: and all and every broker or brokers, agent or agents, who ſhall negotiate, tranſact, or intermeddle in the making, or procuring to be made, any ſuch contract, or agreement, as aforeſaid, and ſhall know that the perſon, or perſons, by whom or on whoſe behalf ſuch contract or agreement ſhall be made, is or are not poſſeſſed of, or entitled unto, the ſtock or ſecurity concerning which ſuch contract or agreement ſhall be made, in his, her, or their own name or names, or in the name or names of a truſtee, or truſtees, for their uſe or right, ſhall, for every ſuch offence, forfeit and pay the ſum of 100*l.* to be recovered by action of debt, as aforeſaid."

By the 9th ſection it is enacted, "That all and every broker or brokers, or other perſon or perſons, who ſhall negotiate or act as a broker, receiving brokerage in the buying, ſelling, or otherwiſe diſpoſing of any of the ſaid public or joint ſtocks, or other public ſecurities, ſhall reſpectively keep a book or regiſter, which ſhall be called the broker's book; in which ſaid book he and they ſhall fairly, juſtly, and truly enter all contracts, agreements and bargains, that he or they ſhall, from time to time, make between any perſon or perſons whatſoever, on the day of the making ſuch contract or agreement, together with the names of the principal parties, as well buyers as ſellers, and alſo the day of making ſuch contract,

contract or agreement, to the intent and purpoſe that ſuch broker or brokers, and other perſon or perſons acting or negotiating as ſuch, as aforeſaid, ſhall, from time to time, produce ſuch book or regiſter, when thereunto lawfully required: and in caſe ſuch broker or brokers, or any other who ſhall negotiate, or act as a broker, as aforeſaid, in relation to any of the ſaid matters, ſhall not keep ſuch book or regiſter, or ſhall wilfully omit to enter therein, fairly, juſtly, and truly, any ſuch contract, bargain or agreement as aforeſaid, he or they ſhall, for every ſuch offence or omiſſion, forfeit and pay the ſum of 50*l.* to be recovered by action of debt, as aforeſaid."

By the 10th ſection it is provided "That nothing in this act contained ſhall extend, or be conſtrued to extend to any contracts or agreements for the purchaſe or ſale of any ſtock, annuities, or other public ſecurities, to be made with the privity of the Accountant-General of the Court of *Chancery*, in purſuance of any decree or order of the ſaid court; but that all ſuch contracts and agreements may be made and performed in the ſame manner as they might have been, if this act had never been made."

And by the 11th ſection it is alſo provided and enacted, "That nothing in this act contained ſhall extend, or be conſtrued to extend, to hinder or prevent any perſon or perſons from lending any ſum or ſums of money on any public or joint ſtocks, or other public ſecurities whatſoever, or any part, ſhare, or intereſt therein, or to prevent or hinder any defeazance, contract or agreement being made or entered into for the re-delivering, aſſigning, or transferring ſuch public or joint ſtock, or other public ſecurities, or any part, ſhare, or intereſt therein, upon the re-payment of the ſum or ſums of money which ſhall have been lent and borrowed thereupon, with intereſt for the ſame, ſo as no premium, or other conſideration whatſoever be paid to, or received by the perſon or perſons lending ſuch money, for or in conſideration of ſuch loan, more than legal intereſt."

Upon the 6th ſection of this act it has been determined, that to recover damages againſt one who had refuſed to accept and pay for ſtock agreed to be ſold to him, it is neceſſary to prove an actual transfer of the ſtock to ſome other perſon, before the action brought; and proof alone of a contract to ſell to ſuch other perſon before the action brought, though followed up by an actual transfer afterwards, is not ſufficient to ſuſtain the action.

Thus,

Thus, in the caſe of *Heckſcher* and others *v. Gregory*, (*b*) which was an action of *aſſumpſit* wherein the plaintiffs declared, that, at the times of making the ſeveral ſales and offers of transfer aftermentioned, viz. on the 5th of *May*, 1803, they were entitled to the intereſt or ſhare of 1000*l.* ſtock 3 *per cent. cons.* ſtanding in the books of the Bank of *England*, in the name of *Daniel Eliaſon*, as their truſtee; and being ſo entitled, it was agreed between them and the defendant that the plaintiffs bargained to ſell, and the defendant to buy of them, their intereſt in the ſaid ſtock, at the price of 70¼*l.* for money; and the ſaid ſtock was to be transferred on that day into the name of the defendant; and he was then to pay the price of the ſame to the plaintiffs: and the ſaid agreement being ſo made, afterwards, &c. in conſideration that the plaintiffs, at the inſtance of the defendant, had promiſed to perform the ſaid agreement in every thing on their parts to be performed, the defendant promiſed to the plaintiffs to perform every thing on his part, &c. The plaintiffs then averred that they, on the ſaid 5th day of *May*, 1803, were ready and willing to tranſfer the ſtock at the price aforeſaid, and in purſuance of the ſaid ſale; and did then and there, in due manner, tender and offer to transfer the ſame, &c. to the defendant, according to the ſaid ſale, and to make the proper entries, &c. in the books of the Bank, &c. of all which premiſes the defendant then and there had notice, and was then and there requeſted to accept and pay for the ſaid ſtock; but the defendant then and there, and from thence hitherto has refuſed to accept the ſaid transfer, or take the intereſt ſo ſold to him, or pay for the ſame, according to the ſaid ſale. And then the plaintiffs averred, that, from the time of their making ſuch tender and offer as aforeſaid until the commencement of this ſuit, they were unable to ſell the ſaid ſtock, or any part of it, at or for the price or rate aforeſaid. And the plaintiffs afterwards, and before the commencement of this ſuit, viz. on the 9th of *June*, 1803, ſold the ſaid ſtock at a leſs price than aforeſaid, viz. for 58¾*l. per cent.* &c. There were other counts, laying the ſame tranſaction in different ways; concluding to the plaintiff's damage, &c.

At the trial before Lord *Ellenborough*, Ch. J., at *Guildhall*, it appeared, that the plaintiffs, who reſided abroad, had written to their agent, Mr. *Eliaſon*, on the 22d of *April*, 1803, adviſing him

(*b*) 4 *Eaſt Rep.* 607.

to

to ſell out their ſtock as ſoon as ſtocks roſe to a certain price: and an opportunity offering for this purpoſe on the 5th of *May*, upon intelligence then ſuppoſed to have been communicated by one of His Majeſty's ſecretaries of ſtate, to the *Lord Mayor* of *London*, purporting that all differences ſubſiſting between this country and *France* were happily terminated; (a letter which very ſoon afterwards turned out to be a forgery;) in conſequence of which the ſtocks ſuddenly roſe to 70¾*l.* *Eliaſon*'s broker contracted for the ſale of the ſtock at that price to the defendant, and a transfer was, on the ſame day, directed to be made to him; and the ticket neceſſary for making the transfer was given in at the Bank. But before ſuch transfer could be made, the fraud was diſcovered, and the defendant refuſed to execute his bargain, though the ſtock was formally tendered to him on the ſame day. In conſequence of the defendant's refuſal, *Eliaſon* wrote to his principals abroad, the plaintiffs, and, on the receipt of their anſwer, the plaintiff's broker received directions to ſell the ſtock on the 9th of *June* following; and a contract of ſale was then accordingly made to a Mr. *Cope*, for 57¾*l.* *ex. div.*; but as the ſtocks were then ſhut, no transfer could be made, nor was any in fact made till the opening on the 6th of *July*, 1803. The declaration was of *Trinity* Term 1803, and the memorandum on the *Niſi Prius* record was of the 25th of *June*, to which day, of courſe, the commencement of the action related. Lord *Ellenborough* was of opinion that an actual re-ſale and transfer were neceſſary by the ſtat. 7 *Geo.* II. c. 8. to the maintenance of the action; and that the mere contract of ſale which took place on the 9th of *June* was not ſufficient in itſelf, without the actual transfer, which was the completion of the ſale, which was not made till after the commencement of the action. He therefore nonſuited the plaintiff; but a rule *niſi* was afterwards obtained for ſetting aſide the nonſuit, and having a new trial; which was moved on the grounds, 1ſt, that an actual transfer was not neceſſary to ſupport the action; or, 2dly, if it were, yet that, when made, it would relate to the time of the ſale, which was before the action, and the only thing required by the ſtatute to ſuſtain the action.

The Court were of opinion that an actual transfer was neceſſary to ſupport the action; and for want of ſuch transfer before the action brought, the plaintiff could not ſuſtain the action.

Lord *Ellenborough*, Ch. J. ſaid, "The object of the act was to prevent radically all dealings in ſtock by perſons who were not

proprietors, and who ſhould not actually make a transfer of their intereſt in the ſtock. And, therefore, to entitle the proprietor to recover damages in any caſe for the non-performance of a contract for the purchaſe of his ſtock, he muſt either ſpecifically carry that contract into execution, by firſt making a transfer to the party with whom he contracted, according to the 5th ſection, or, in caſe of the inſolvency or inability of the latter, by firſt making an actual transfer to a ſubſtituted purchaſer, according to the proviſion of the 6th ſection; and then he may recover the difference againſt the original contractor. But in no caſe ſhall any conſideration be voluntarily paid for the compounding any difference for the not transferring ſtock; but there muſt be an actual transfer: and then the difference between the purchaſe-money contracted for, and that actually received, ſhall be the meaſure of damage to be recovered. The 5th ſection requires that the contract ſhall be ſpecifically performed: but that cannot be ſaid to be a ſpecific performance where any thing executory remains to be done. The ſtock agreed to be aſſigned, transferred, or delivered, ſhall be actually ſo done. The money, too, agreed to be given ſhall be actually and really given or paid. The 6th ſection merely enables the proprietor to ſubſtitute another purchaſer in lieu of him with whom he had contracted, and who had refuſed or neglected to pay for the ſtock; but that is to be done in the ſame manner, by an actual ſale and transfer, and then the price actually paid, compared with that which which was contracted to be paid, is to form the meaſure of damages for the non-performance of the original contract. The act ſays, that after ſuch ſale the party ſhall receive or recover the damage; but that cannot be till after the completion of the contract of ſale which is by the transfer. In each caſe provided for by the act, there muſt be a ſpecific contract of ſale executed; and when the contract of ſale is thus perfected, the difference is, that the party is entitled to recover in damages againſt the perſon with whom he had contracted, and who had refuſed to perform his contract. The words are, "That no perſon who ſhall ſell any ſtock," &c. (*c*) There, indeed, the word ſell is not uſed in its proper ſenſe, as denoting a perfect and complete ſale, but in a looſer ſenſe, as denoting a contract for ſale, an inchoate ſale, as it may be called, one to be perfected afterwards by an actual transfer: for the

(*c*) *Ante*, 248.

clauſe

clauſe goes on to ſay, that no perſon who ſhall ſell ſtock "to be "delivered and paid for on a certain day, and which ſhall be re- "fuſed or neglected to be paid for according to ſuch agreement, "ſhall be obliged to transfer the ſame;" but he may ſell ſuch "ſtock to any other perſon, &c., and, after ſuch ſale, receive or recover from the firſt contractor the damages ſuſtained by his breach of contract. But the whole context and ſpirit of the act ſhows that by the word ſale, in the latter part, was meant, not merely a contract of ſale, but a ſale properly ſo called, followed up and perfected by an actual transfer: for otherwiſe the whole policy of the act might be defeated, as a man might make twenty contracts of ſale of the ſame ſtock, and ſatisfy the words of the act, by ſtipulating for 'as many contracts of reſale,' paying or receiving the difference, without the ſtock being ever actually tranſferred out of his own name. But there can be but one transfer of the ſame ſtock; and that was the ſecurity intended by the legiſlature for the reality of the tranſaction. Here it unfortunately happened that the ſtock was ſhut at the time when the contract of ſale was made, in conſequence of which no transfer could be made of it at the time: but we cannot ſupply the omiſſion; and, for want of ſuch transfer before the action brought, the requiſite of the act has not been complied with, and the plaintiff cannot ſuſtain his action.

Groſe, J. "The ſtatute was meant to prevent all gambling ſpeculations in the ſtocks, and that damages for non-performance of contracts for the ſale of ſtock ſhould only be computed upon real tranſactions. And for this purpoſe no method could be more effectual than requiring an actual transfer of the ſtock before any action for damages, for the breach of any contract for the ſale of it, could be maintained. And this is what the act requires to be done. Therefore, where ſtock has been contracted to be ſold, and it is afterwards refuſed to be accepted and paid for, the act requires that it ſhall firſt be ſold to ſome other perſon before any action can be brought for the breach of the firſt contract. This, from the whole view of the act, and comparing the ſeveral clauſes together, muſt be meant of a ſale followed up and perfected by an actual transfer; without which the object of the legiſlature could not be attained."

Lawrence, J. The 6th ſection, it muſt be confeſſed, is rather awkwardly worded: for though in other parts of the act the tranſ-

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fer is expreſsly mentioned, yet it is not in terms required in that part of the clauſe on which this queſtion ariſes. A contract of ſale may, indeed, be complete before the transfer of the ſtock; and, by virtue of ſuch a contract, the owner would be compellable to make a transfer, in order to complete the ſale; and ſo the act conſiders it: for if the buyer neglect or refuſe to pay for his bargain, the act abſolves the ſeller from transferring the ſtock to him; and in that ſenſe the ſale and the transfer of the ſtock may be different: yet, taking the whole act together, the legiſlature, by the word ſale, ("after ſuch ſale,") muſt have intended a ſale, followed up and perfected by a transfer; otherwiſe the object of the law might be defeated. The 5th ſection provides for the caſe between the original parties to the contract; and then there is an expreſs proviſion that the ſtock ſhall be transferred. The 6th ſection provides for the caſe where the ſtock is refuſed to be paid for by the buyer; and it enables the ſeller to withhold the tranſfer, and ſell to another; and, after ſuch ſale, gives the remedy for damages againſt the original contractor. Still keeping in view, therefore, the neceſſity of a real tranſaction, this clauſe merely enables the ſeller to ſubſtitute another purchaſer in lieu of the firſt, who had made default in payment: and it is clear, by the 5th clauſe, that there muſt have been a transfer to him. Then again, under the 7th ſection, which gives a remedy to the buyer to whom the ſtock is refuſed to be transferred, it is clear that no action can be maintained till after the purchaſe and acceptance of other like ſtock; and the damages are given againſt the ſeller, for not delivering or transferring the ſtock, or other ſecurities. Therefore, conſtruing the whole together, it is evident that the legiſlature meant that the actual transfer of the ſame, or other ſtock, ſhould precede the action for the recovery of damages, for the not buying or not ſelling ſtock, contracted to be bought or ſold. There could be no reaſon for putting the buyer and ſeller in different ſituations, with regard to their reſpective remedies, for a breach of the ſame contract; more eſpecially as it is evident that the legiſlature looked to the actual transfer of the ſtock, as the means to provide againſt gambling ſpeculations."

Le *Blanc*, J. "It is no uncommon thing, in the conſtruction of ſtatutes, to give different meanings to the ſame word uſed in different parts of an act, where it is clear that it is uſed in a different ſenſe. Here the legiſlature, in the firſt part of the 6th clauſe,

clauſe, has uſed the word ſell to mean a contract to ſell; and in the latter part they have uſed it to mean a ſale completed by a transfer. And this is evident from comparing that with the 5th and 7th clauſes. The object of the legiſlature certainly was to prevent gambling tranſactions in the funds by perſons making pretended bargains for the purchaſe of ſtock, when no ſtock was, in fact, transferred, but only the differences of the prices ſettled at the appointed times. It is therefore provided, that no perſon ſhould be entitled to recover damages againſt another, as for refuſing to buy or ſell ſtock, except there was a convincing proof given that the parties were fair and *bonâ fide* buyers and ſellers of the ſtock, by their having reſpectively put themſelves fairly into the condition they aſſumed to contract for, by an actual transfer, in the caſe of a ſeller of the ſtock which he had contracted to ſell, or in that of a buyer, by the actual acceptance and receipt of the ſame quantity of ſtock which he had before agreed to purchaſe. And ſuch transfer was looked to as the criterion of a fair tranſaction for the purchaſe or ſale of ſtock: for otherwiſe a man who had made one contract for ſale which had been broken, and for which he ſought to recover damages, might make a contract for the ſale for the purpoſe of trying his cauſe, and aſcertaining his damages, with a ſtipulation for a re-ſale of the ſame ſtock to him, after the purpoſe was anſwered. And thus, after all, the caſe would turn out to be one of thoſe very tranſactions which the legiſlature meant to prevent."

So, in an action for not accepting ſtock agreed to be transferred on requeſt, an averment that the plaintiff was ready and willing to transfer, and requeſted the defendant to accept the ſtock which he refuſed, can only be ſatisfied by ſhowing an *actual* tender and refuſal, or that the plaintiff waited at the Bank, on the day when it was underſtood that the transfer was to be made, until the cloſe of the books, which was the lateſt time when the transfer could be made. But in ſuch action it does not ſeem neceſſary for the plaintiff to ſhow that he transferred the ſtock to another at the next poſſible transfer day, after default made by the principal contractor, provided the ſtock were transferred before the action brought: though, if the plaintiff might have obtained more for the ſtock by a ſale on any intermediate day, between the original default and the actual ſale, that will go in the reduction of the damages ſuſtained by the plaintiff by ſuch default.

Thus,

Thus, in the caſe of *Bordenave* v. *Gregory*, (*d*) the firſt count of the declaration ſtated, that the plaintiff, on the 5th *May*, 1803, at, &c. was poſſeſſed of 1000*l.* ſtock 3 *per cents.* the ſaid ſtock, together with other capital ſtock of the plaintiff, then ſtanding in his name in the books of the Bank of *England*; and the plaintiff being ſo poſſeſſed, afterwards ſold to the defendant the ſaid 1000*l.* ſtock, for 69¼ *per cent.*; and then and there promiſed the defendant, that he (the plaintiff) would transfer the ſaid 1000*l.* ſtock to the defendant, in the ſaid books of the Bank, upon payment, by the defendant, of the ſaid price for the ſame, when the plaintiff ſhould be thereto afterwards requeſted: and, in conſideration of the premiſes, the defendant then and there promiſed the plaintiff to accept the ſame ſtock, and pay for the ſame at the rate aforeſaid, when the defendant ſhould be thereunto afterwards requeſted. The plaintiff then averred that he was ready and willing, and offered to transfer the ſaid 1000*l.* ſtock to the defendant, according to the form and effect of the ſaid contract, upon payment by him of the ſaid price for the ſame; and then and there requeſted the defendant to accept the ſame ſtock, and pay the ſaid price, &c.: yet the defendant would not, when ſo requeſted, or at any time, accept the ſaid ſtock, or pay the price, &c.; but then and at all times omitted and refuſed ſo to do, &c.; by reaſon whereof the plaintiff was obliged to ſell and transfer, and has ſold and transferred the ſaid 1000*l.* ſtock for a leſs price than that for which he had ſold the ſame to the defendant, viz. at 64*l. per cent.* being the beſt price he could obtain for the ſame; to the plaintiff's damage of ſo much, &c. At the trial, at *Guildhall*, before Lord *Ellenborough*, Ch. J. the evidence, ſo far as it was material to raiſe the queſtions made, was, that the contract for the ſale of the ſtock was made on the 5th of *May*, 1803, a little before 12 o'clock at noon; but there was no proof of any direct application made to the defendant to accept the ſtock on that day, nor was it ſhown that the plaintiff had waited till the cloſing of the transfer books, at the Bank, for the defendant to appear, and accept the transfer of it. But a few days afterwards an offer was made of the ſtock, which was then refuſed to be

(*d*) 5 *Eaſt Rep.* 107. *Vide* Callonel v. Briggs, 1 *Salk.* 112. *S. P.*

accepted by the defendant, alleging that the contract had been made under an impreſſion of the truth of certain public intelligence of peace, communicated to the *Lord Mayor*, which afterwards turned out to be a forgery; in conſequence of which a reſolution had been entered into, by the members of the ſtock-exchange, that all bargains made on that day ſhould be reſcinded: and, in conſequence of the defendant's refuſal, the ſtock was afterwards ſold, at an inferior price, on the 12th of *May*, there having been no intermediate riſe of the funds between the 5th and the 12th. After a verdict for the plaintiff for the difference, two queſtions, which had been made at the trial, were again raiſed, on a rule for ſetting aſide the verdict; 1ſt. whether it was not incumbent on the plaintiff, in ſupport of the allegations in his declaration, to prove, either an actual tender of the ſtock, and offer to transfer it on the 5th of *May*, the day on which it was contracted for; or that which was an equivalent in law, namely, that the plaintiff waited till the laſt moment of the day when the tranſfer books at the Bank were cloſed, ready to have made the tranſfer, if any perſon had been preſent, on the part of the defendant, to have accepted it? 2dly, Whether, in order to entitle the plaintiff to recover, it were not neceſſary for him, by the ſtat. 7 *Geo.* 2. *c.* 8. to ſhow an actual transfer to ſome other, on the next transfer day, (which was the 6th.) and whether a tranſfer on the 12th were ſufficient, not having been made as ſoon as it might?

With reſpect to this laſt queſtion, the Court reſerved it for future conſideration, when it might be put in a more ſolemn courſe of inveſtigation, in the ſhape of a ſpecial verdict, or upon a bill of exceptions. But the reporter adds, that the majority of the Judges were inclined to conſider that the Act of Parliament did not require, as a condition precedent to maintaining the action for damages for not performing a contract to purchaſe and accept ſtock, that the proprietor ſhould, on the defendant's neglect or refuſal to accept the ſtock, have ſold it to another on or before the next transfer day after ſuch default: but it merely ſays, that it ſhall be lawful for him to ſell ſuch ſtock, not ſaying when. And it was ſufficient, they intimated, if the ſtock were ſold and transferred at any time prior to the commencement of the action againſt

againſt the defendant who had ſo made default; eſpecially where due diligence had been uſed by the proprietor, as the jury had found in this caſe. Though if the ſtock had riſen in value, in the intermediate time between the default of the defendant and the time when the ſtock was actually ſold and transferred, ſo that the plaintiff might have obtained a higher price than that for which it was actually ſold, but leſs than the price contracted for by the defendant, they thought it material for the conſideration of the jury, in aſſeſſing the damages; becauſe the ſtatute directs that the party injured ſhall recover from the perſon who firſt contracted for the purchaſe of the ſtock, "all the damage which "ſhall be ſuſtained thereby," that is, from his default; and the damage to be ſuſtained thereby does not neceſſarily mean the difference of the price on the day of the actual ſale, and that for which it was contracted to be ſold: for if he might have obtained more at any intermediate time, he may not be ſaid to have thereby ſuſtained (that is, by the default of the defendant,) the damage which he incurred by waiting, but by his own default. The jury therefore were, in each caſe, to inquire whether the plaintiff might not have ſold ſooner than he did, and thereby ſaved part of the loſs.

Lord *Ellenborough*, Ch. J. ſaid, "The plaintiff cannot ſuſtain the action without ſhowing a tender of the ſtock and a refuſal, or that which in law is tantamount to a tender and refuſal. That muſt be by ſhowing either an actual tender and refuſal, which is not pretended to have been done in this caſe till after the 5th of *May*, or by ſhowing that the plaintiff ſtaid at the Bank to the laſt time of that day when a tender could have been made, which was ſo long as the transfer books remained open; and that he was there, ready to have transferred, if the defendant had been there and would have accepted the ſtock. From the nature of the contract, it is evident that it was meant to be performed on the day on which it was made, for the price was calculated accordingly, and the only place where the transfer could be made was at the Bank. The plaintiff, therefore, ought to have ſhown that he had done every thing, as far as in him lay, towards the execution of the contract, according to the caſe cited, by waiting till the final cloſe of the transfer books at the Bank on that day, which

would have been a ſufficient ſubſtitution of the more formal evidence of an actual tender and refuſal: but here there was neither a tender in fact nor in law."

The other Judges concurred on this point. The rule for ſetting aſide the verdict was therefore made abſolute.

Upon the 8th ſection of the act it has been decided, that if *A.*, being poſſeſſed of a certain quantity of ſtock, empowers *B.*, at his requeſt, to ſell the ſame for his own benefit, in conſideration of which *B.* agrees to transfer, at the next opening, the ſame quantity of ſtock in *A.*'s name, ſuch a contract is not prohibited by the the act; but that, on failure of *B.*'s engagement, *A.* may maintain an action of *aſſumpſit* againſt *B.* to recover the value of the ſtock.

Thus, in the caſe of *Sanders* v. *Kentiſh* and *Hawkſley*, (*e*) which was an action of *aſſumpſit* for not transferring 3000*l.* 4 *per cents.* into the plaintiff's name, at the opening day in *April*, 1795; on the trial, a verdict was found for the plaintiff for 2,820*l.* ſubject to the opinion of the Court of *King's Bench* on the following caſe:

On the 1ſt of *December*, 1794, the plaintiff, being poſſeſſed of the ſum of 3000*l.* 4 *per cent.* annuities, executed to the defendant, *Kentiſh*, a letter of attorney, empowering him to ſell the ſame, and to apply the produce for his own benefit; in conſideration of which, *Kentiſh*, and the defendant *Hawkſley*, as a ſurety for *Kentiſh*, ſigned an engagement, or undertaking, whereby they engaged "on the opening of the 4 *per cents.* conſols, to transfer 3000*l.* 4 *per cent.* annuities, in the name of the plaintiff, in lieu of the ſame ſum ſold by him on account of *Kentiſh*." On the 3d of *December*, 1794. the defendant, *Kentiſh*, by virtue of the letter of attorney, ſold and transferred the ſaid ſtock to three different perſons, for 2516*l.* 5*s.* which he received for his own uſe. No ſtock was transferred to the plaintiff according to the above agreement. The defendants, at the time of making the agreement to transfer the ſtock as aforeſaid, were not, nor was either of them poſſeſſed of or entitled to, in their or either of their own name or names, or in the name or names of a truſtee or truſtees,

(*e*) 8 *Term Rep.* 162. 2 *Eſp. Rep.* 698. *S. P.*

to

to their or either of their uſe, of any ſuch ſtock as in the contract or agreement mentioned, or any 4 *per cent.* annuities whatſoever. The queſtion was, whether the plaintiff was prevented from recovering by the ſtatute 7 *Geo.* 2. *c.* 8 *ſ.* 8. ?

The Court were of opinion, that the contract was valid, and not prohibited by the ſtatute, and that the plaintiff was entitled to recover.

Lord *Kenyon*, Ch. J. ſaid: "It is impoſſible to read this caſe without feeling great indignation at the conduct of the defendant *Kentiſh*. The caſe is ſhortly this: the defendant, *Kentiſh*, who is a ſtockbroker, and who was therefore moſt probably acquainted with the ſtatute on which his counſel has now relied, applied to the plaintiff, a clergyman, who was probably ignorant of that law, and obtained from him a loan of 3000*l.* ſtock, on an undertaking to replace the ſame ſtock on a given day; from this tranſaction the plaintiff was to derive no advantage whatever; the plaintiff gave him a letter of attorney, empowering him to ſell the ſtock; he then put the money into his pocket, and when the day of payment arrived refuſed to pay the plaintiff, inſiſting that the ſtatute rendered the contract void, and that therefore the plaintiff cannot enforce that contract in a court of law. To be ſure if ſuch were the poſitive proviſions of that ſtatute, the conſequence muſt follow, however hard it might preſs upon the plaintiff. But before we aſſented to ſo monſtrous a propoſition we would look with eagle's eyes into every part of the ſtatute, to ſee that ſuch was the intention of the legiſlature. Their intention is to be collected from the whole act taken together. The act is intitled "An Act to prevent the infamous Practice of Stock-jobbing." But if the defendant's objection were to prevail the title of the act ought to be altered, and it ſhould run thus, "An Act to encourage the wickedneſs of Stock-jobbers, and to give them the excluſive privilege of cheating the reſt of Mankind." On conſidering the whole of the act together I am clearly of opinion, that its object was only to prevent gambling in the funds; but the legiſlature did not mean to prohibit a loan of ſtock, and an undertaking to replace it. I do not think that this caſe comes within the meaning of the prohibitory clauſes in the act, but it is within the exception in the laſt ſection."

In eſtimating the meaſure of damages in an action for breach of an engagement to replace ſtock on a given day, it is not enough to take the value of the ſtock on that day if it have riſen in the mean time; but the higheſt value as it ſtood at the time of the trial; there being no offer of the defendant to replace it in the intermediate time while the market was riſing. (*f*)

(*f*) Sheppard v. Johnſon, 2 *Eaſt Rep.* 211.

CHAPTER

CHAPTER VIII.

Of Contracts of Warranty upon Sales.

1. *Of Contracts of Warranty upon the Sale of Goods.*] In contracts for ſales, it is conſtantly underſtood that the ſeller undertakes that the commodity he ſells is his own; and if it proves otherwiſe, an action on the caſe, in nature of deceit, (*a*) or an action of *aſſumpſit* (*b*) lies againſt him.

Thus, (*c*) where a man ſells goods as his own, when they are the goods of a ſtranger, an action lies againſt him without an *expreſs* warranty.

So, if a ſeller ſay, that they are the goods of *A.* which he has authority to ſell, when they are the goods of another; though it is not averred, that he knew them to be the goods of a ſtranger. (*d*)

This diſtinction, however, is ſaid to have been taken by *Holt*, Ch. J. that where the ſeller has the poſſeſſion of the goods the bare affirming them to be his is ſufficient: but that if he be out of poſſeſſion, there muſt be an expreſs warranty in order to ſupport an action.

Thus, in the caſe of *Medina* v. *Stoughton*, (*e*) the declaration ſtated, for that the defendant being poſſeſſed of a certain lottery ticket, ſold it to the plaintiff, affirming it to be his own, whereas in truth it was not his but another's. The defendant pleaded that he bought it *bonâ fide*, and ſo ſold it. The plaintiff demurred to the plea. And *Per Holt*, Ch. J. 1ſt: "Where one

(*a*) 3 *Bl. Com.* 166. (*b*) Stuart v. Wilkins, *Doug.* 18.

(*c*) Furnis v. Leiceſter, *Cro. Jac.* 474. 197. 1 *Rol. Abr.* 90. *pl.* 6. Croſſe v. Gardner, *Carth.* 90.

(*d*) 1 *Rol. Abr.* 91. *pl.* 7. *Com. Dig. tit.* Action upon the Caſe for a Deceit, A. 8.

(*e*) 1 *Salk.* 210. 1 *Ld. Raym.* 593. *S. C. but differently reported.*

having the poſſeſſion of any *perſonal* chattel ſells it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation; for his having poſſeſſion is a colour of title, and, perhaps, no other title can be made out; *aliter*, where the ſeller is out of poſſeſſion, for there may be room to queſtion the ſeller's title, and *caveat emptor*, in ſuch caſe, to have either an expreſs warranty or a good title: ſo it is in the caſe of lands, whether the ſeller be in or out of poſſeſſion, for the ſeller cannot have them without a title, and the buyer is at his peril to ſee it." *

But, Mr. Juſtice *Buller*, in ſpeaking of this caſe, makes the following obſervation: (*f*) "The caſe of *Medina* v. *Stoughton*, in the point of deciſion, is the ſame as *Croſſe* v. *Gardner*: (*g*) but there is an *obiter dictum* of *Holt*, Ch. J. that where the ſeller of a *perſonal* thing is out of poſſeſſion, the bare affirming it to be his is not ſufficient, for there may be room to queſtion the ſeller's title, and *caveat emptor*, in ſuch caſe, to have an expreſs warranty or a good title. This diſtinction by *Holt* is not mentioned by Lord *Raymond* 593. who reports the ſame caſe: and if an affirmation at the time of ſale be a warranty, I cannot feel a diſtinction between the vendor's being in or out of poſſeſſion. The thing is bought of him, and in conſequence of his aſſertion: and if there be any difference it ſeems to me that the caſe is ſtrongeſt againſt the vendor when he is out of poſſeſſion, becauſe then the vendee has nothing but the warranty to rely on."

The warranty muſt be *upon the ſale*; for if it be made *after*, and not *at* the time of the ſale, it is a void warranty: for it is then made without any conſideration; neither does the buyer then take the goods upon the credit of the vendor. Alſo the warranty can only reach to things in being at the time of the warranty made, and not to things in *futuro*: as, that a horſe is ſound at the buying of him; not that he will be ſound two years hence. (*b*) But if the vendor knew the goods to be unſound, and hath uſed any art to diſguiſe them, or if they are in any ſhape different from what he repreſents them to be to the buyer, this artifice ſhall be equivalent to an expreſs warranty, and the vendor is anſwerable for their goodneſs. (*i*)

* *Vide Cro. Jac.* 197. *Same dictum.*

(*f*) *Vide* Paſley v. Freeman, 3 *Term Rep.* 57. (*g*) *Carth.* 90.

(*b*) *Finch's Law*, 189. *Dy.* 76. *a. F. N. B.* 98. K. 2 *Cro.* 630. 2 *Rol. Rep.* 5. 3 *Bl. Com.* 166. (*i*) *Ibid.*

Where a treaty for the ſale of a commodity had been entirely broken off, a warranty made at the time of ſuch treaty, was holden not to extend to a ſubſequent ſale of the ſame commodity at a reduced price.

Thus, in an *anonymous* caſe, (*k*) which is reported as follows: "The defendant came to the plaintiff, who was a ſword cutler, to ſell him a ſecond-hand ſword: and upon his warranting it to be a ſilver hilt, the plaintiff offered him a guinea and a half for it; the defendant refuſed to take the money, and thereupon went to ſeveral other ſword cutlers, but not meeting with any who would give ſo much as the plaintiff, he came back to him, and told him he ſhould have it for the price he offered, the plaintiff upon that thinking to have it cheaper, refuſed to give the guinea and a half, and at laſt beat down the price to 28*s.*, which was paid the defendant for the ſword. Afterwards the plaintiff found that the gripe of it was only ſilver, and the reſt of the hilt was braſs; upon which he brings his action againſt the defendant, and declares upon the warranty of the hilt's being *ſilver*, when in fact it was *braſs*: but not being able to prove a warranty upon the ſecond bargain, he was nonſuit. *Pratt*, Chief Juſtice, being of opinion, that the warranty upon the bidding a guinea and a half would not extend to this ſale, which was a new and different contract, at a different time. Alſo he ſeemed to be of opinion, that the gripe being ſilver, the plaintiff ſhould have declared ſpecially on a warranty of the reſt of the hilt only, and have ſaid that that part was braſs."

Yet, it is ſaid, (*l*) that if a man warrant a horſe to be ſound *before* ſale, upon which another buys him; if the horſe turn out to be unſound, an action lies; for the warranty was the cauſe of the buying.

If a perſon having goods which are damaged, and knowing them to be ſo, ſell them for ſound and marketable goods, and affirm them to be ſo, an action on the caſe lies for the deceit: but if the ſeller, at the time of the ſale, does not know that they are damaged, no action lies without an *expreſs warranty*; though, at the time of the ſale, he affirm them to be ſound.

(*k*) *Stra.* 414. (*l*) 1 *Rol. Abr.* 96. *l.* 5. 1 *Salk.* 211.

Thus,

Thus, in the caſe of *Chandelor* v. *Lopus*, (*m*) which was an action upon the caſe wherein the plaintiff declared. Whereas the defendant being a goldſmith, and having ſkill in jewels, and precious ſtones, had a ſtone which he affirmed to *Lopus* to be a bezar-ſtone, and ſold it to him for 100*l*., *ubi revera*, it was not a bezar-ſtone. The defendant pleaded not guilty, and a verdict was given and judgment entered for the plaintiff in the *King's Bench*.

Chandelor

But error was thereof brought in the exchequer chamber, becauſe the declaration contains not matter ſufficient to charge the defendant, *viz.*, that he warranted it to be a bezar-ſtone, or that he knew that it was not a bezar-ſtone; for it may be he himſelf was ignorant whether it were a bezar-ſtone or not.

And all the juſtices and barons, (except *Anderſon*,) held, "that for this cauſe it was error, for the bare affirmation that it was a bezar-ſtone, without warranting it to be ſo, is no cauſe of action: and although he knew it to be no bezar-ſtone, it is not material; for every one in ſelling his wares will affirm that his wares are good, or the horſe which he ſells is ſound; yet if he does not warrant them to be ſo, it is no cauſe of action, and the warranty ought to be made at the time of the ſale; as *F. N. B.* 94. C. and 98. B. 5 *Hen.* 7. pl. 41. 9 *Hen.* 6. pl. 53. 32 *Hen.* 4. pl. 1. 42 *Aſſ.* 8. 7 *Hen.* 4. pl. 15. Wherefore, foraſmuch, as no warranty is alleged, they held the declaration to be ill."

Anderſon to the contrary: "for the deceit in ſelling it for a bezar, whereas it was not ſo, is cauſe of action." But, notwithſtanding, it was adjudged to be no cauſe, and the judgment was reverſed.

So, upon a ſale of hops by the ſample, with a warranty that the bulk of the commodity anſwered the ſample, the law does not raiſe an *implied* warranty that the commodity ſhould be merchantable; though a fair merchantable price were given; and therefore if there be a latent defect then exiſting in it, unknown to the ſeller, and without fraud on his part, (but ariſing from the fraud of the grower from whom he purchaſed,) ſuch ſeller

(*m*) *Cro. Jac.* 4. *vide* 1 *Dy.* 75. *a. F. N. B.* 94. C. 3 *Bl. Com.* 166. 3 *Woodes Lect.* 199.

8 is

is not anſwerable, though the goods turned out to be unmerchantable: but if the ſample anſwers fairly to the commodity in bulk, the warranty is ſatisfied.

Thus, in the caſe of *Parkinſon* v. *Lee*, (*n*) which was an action of *aſſumpſit*; the firſt count of the declaration ſtated, that in conſideration that the plaintiff would buy of the defendant five pockets of hops at a certain price, the defendant promiſed to deliver to him the ſame, and that the hops ſhould all be of like goodneſs and quality, with a certain ſample of the hops contained in each of the five pockets, and then produced and ſhown by the defendant to the plaintiff. It then ſtated that the plaintiff, confiding in the defendant's promiſe, afterwards bought the hops, &c., and that afterwards the defendant delivered to the plaintiff five pockets of hops, as and for hops of like goodneſs and quality with the reſpective ſamples ſo as aforeſaid produced and ſhown to the plaintiff; yet that the defendant did not regard his ſaid promiſe, but thereby deceived and defrauded the plaintiff in this reſpect, that the hops, contained in each of the five pockets ſo delivered to the plaintiff, at the time of delivery thereof to him, were not hops of like goodneſs and quality with the reſpective ſamples, but were much inferior, &c., and were bad, damaged and unſaleable hops; whereby the plaintiff loſt the benefit of ſelling the ſame, &c., and gaining large profits, &c. The ſecond count ſtated the contract to be, that in conſideration that the plaintiff would buy of the defendant five other pockets of hops at a certain price, the defendant promiſed the plaintiff to deliver to him the ſame, and that the ſame ſhould be good, ſound and merchantable hops; and then alleged the purchaſe and delivery as before, of ſo many pockets of hops as and for good, ſound, and merchantable hops; yet that the defendant did not regard his promiſe, but thereby deceived and defrauded the plaintiff in this reſpect, that the ſaid hops, at the time of the delivery thereof to the plaintiff, were not good, ſound and merchantable hops, but on the contrary were bad, damaged and unmerchantable.

At the trial before *Le Blanc*, J. at *Guildhall*, it appeared that the plaintiff and defendant were both dealers in hops. In *January*, 1800, the five pockets were purchaſed by the plaintiff of the defendant, warranted to anſwer the ſamples by which they were ſold. They were not, however, removed till the 8th of

(*n*) 2 *Eaſt Rep.* 314.

July

July from the defendant's to the plaintiff's warehouſe. The price paid was *16l. 5s. per* hundred, which was the fair market price at the time for good merchantable hops. Previous to, and at time of the ſale, the ſamples anſwered fairly to the commodity in bulk; and no defect was perceptible at that time to the buyer: but owing to the grower of the hops having fraudulently watered them after they were dried, before they were originally purchaſed by the defendant, (a fraud to which the defendant was not privy, and of which he was wholly ignorant at the time of the ſale,) it was diſcovered a few days after the removal of them to the plaintiff's warehouſe that one of the pockets was ſo much heated as to be in an unſaleable condition; which pocket was thereupon immediately returned to the defendant, who received it back, and allowed for it in ſettling the account for the other hops, which was done on the 18th of *October* following. In the intermediate time, however, it was found that the other four pockets were in the ſame unſaleable condition from the ſame cauſe; but owing to the plaintiff having firſt attempted to maintain an action againſt *Clarke*, the grower, under the miſtaken ſuppoſition that the defendant was only acting as his agent (which action was afterwards diſcontinued on finding that the defendant was not agent but vendee;) the preſent action was not commenced till upwards of a twelve month after the tranſaction, and after a refuſal by the defendant to allow for the reſt of the pockets. It appeared further, that the object of watering hops, after they are dried, is to give them weight; but the effect of it is, after ſome months, to cauſe them to heat and corrupt in the pockets or bags into which they are packed, till at laſt they become quite unfit for ſale. This effect is not produced on the ſample, which is uſually taken from the middle of the bag, by means of its expoſure to the air. It is impoſſible, even for the beſt judges of the commodities, always to detect this fraudulent practice for ſome time afterwards, by any inſpection of the ſample, or of the commodity itſelf in bulk, till it is diſcloſed by the gradual proceſs of heating. However by the latter end of *July*, 1800, the effects of it were apparent in all the pockets; and at the time of the trial, although the ſamples ſtill continued as at firſt, the commodity in bulk was become perfectly unmerchantable. Upon this evidence the learned judge left it to the jury to find for the defendant on the firſt count, if they were ſatisfied that the commodity agreed at the time with the ſample, by which it was ſold,

and

and there was no fraud on his part; notwithſtanding any latent defect in the commodity in bulk unknown to the parties, by which it became afterwards deteriorated. But he inſtructed them, that if they were ſatisfied that the commodity, at the time of the ſale, had ſuch a latent defect as no prudence or ſkill of the buyer could, on inſpection, detect or guard againſt, the plaintiff was entitled to recover on the implied warranty in the ſecond count although the ſeller had no knowledge of ſuch latent defect; it being the underſtanding of both parties to ſuch a contract, though not expreſſed in the ſpecial warranty, that the one was to ſell, and the other to purchaſe a merchantable commodity. He alſo left it to the jury to conſider whether the plaintiff, by delaying ſo long to proceed againſt the defendant, had thereby waved his remedy againſt him; which the jury anſwered in the negative; and found for the defendant on the firſt count, as the commodity anſwered, in fact, to the ſample at the time of the ſale without fraud, and he had then no knowledge of the latent defect of the commodity. And they gave a verdict for the plaintiff on the ſecond count, conſidering that there was an implied warranty in the ſeller that the commodity was in a merchantable ſtate at the time of the ſale.

A *rule niſi* was obtained for ſetting aſide the verdict and having a new trial, on the ground of a miſdirection of the judge in point of law, and of a defect of evidence to ſupport the finding of the jury on the ſecond count.

The Court, after argument, determined that there ought to be a new trial, upon the ground that there muſt either be an expreſs warranty, or fraud in the ſeller in order to maintain ſuch an action.

Groſe, J. ſaid: "This is a caſe of conſiderable conſequence; becauſe the rule laid down in this caſe muſt extend to all other caſes of ſales, not governed by particular uſages of mode in this reſpect. The queſtion is, whether in the caſe of a ſale made under the preſent circumſtances, there be any implied undertaking in law, that the commodity be merchantable? No expreſs undertaking is proved to that effect; and there is no fraud imputed to the defendant. The mode of dealing is that the plaintiff buys hops from the defendant, whom he knows is not the grower, by ſamples taken from the pockets in which the commodity is cloſe packed. He has an opportunity of judging by the ſamples ſuch as he finds them at the time. If he doubt the goodneſs, or do not chooſe to incur any riſk of a latent defect, he may

may refuſe to purchaſe without a warranty. If an expreſs warranty be given, the ſeller will be liable for any latent defect, according to the old law concerning warranty. But if there be no ſuch warranty, and the ſeller ſell the thing ſuch as he believes it to be, without fraud, I do not know that the law will imply that he ſold it on any other terms than what paſſed in fact. It is the fault of the buyer that he did not inſiſt on a warranty; and if we were to ſay that there was, notwithſtanding, an implied warranty ariſing from the conditions of the ſale, we ſhould again be opening the controverſy, which exiſted before the caſe in *Douglas*. *Before that time it was a current opinion, that a ſound price given for a horſe was tantamount to a warranty of ſoundneſs*; but when that came to be ſifted, it was found to be ſo looſe and unſatisfactory a ground of deciſion, that Lord *Mansfield* rejected it, and ſaid, there muſt be either an expreſs warranty of ſoundneſs, or fraud in the ſeller, in order to maintain the action. Here neither has been ſhown; the defendant merely ſold what he had before bought upon the ſame mode of examination. Therefore I think there ought to be a new trial."

Lawrence, J. "I agree with my brother *Groſe*, that there is no ground for the plaintiff to recover. It is not pretended that the defendant has been guilty of any fraud or impoſition in the ſale. And I muſt ſuppoſe that each party was equally well acquainted with the commodity bargained for. There was no repreſentation made by the defendant to the plaintiff as to the goodneſs of the hops, to induce him to make the purchaſe. But here was a commodity offered to ſale, which might or might not have a latent defect: this was well known in the trade: and the plaintiff might, if he pleaſed, have provided againſt the riſk, by requiring a ſpecial warranty. Inſtead of which a ſample was fairly taken from the bulk, and he exerciſed his own judgment upon it; and knowing, as he muſt have known, as a dealer in the commodity, that it was ſubject to a latent defect which afterwards appeared, he bought it at his own riſk. I know of no authority which makes the ſeller liable for a latent defect, where there is no fraud, and no repreſentation was made by him on the ſubject to induce the buyer to take the thing. In 1 *Roll. Abr.* 90. *P.* it is ſaid, that if a merchant ſell cloth to another, knowing it to be badly fulled, an action on the caſe, in nature of deceit, lies againſt him, becauſe it is warranty in law. But there is no authority ſtated, to ſhow that the ſame rule holds if the commodity ſold have a latent

tent defect, not known to the ſeller. So, again, the caſe is there put, if a man ſell me a horſe with a ſecret malady, without warranting it to be ſound, he is not liable; that is, if there be no fraud. The inſtances are familiar in the caſe of horſes. It is known that they have ſecret maladies, which cannot be diſcovered by the uſual trials and inſpections of the horſe; therefore the ſeller requires a warranty of ſoundneſs in order to guard againſt ſuch latent defects. Then how is this caſe different from the ſale of a horſe, where it is admitted that the buyer muſt ſtand to all ſuch latent defects. To purſue the analogy ſtill further; on the ſale of real eſtates, the ſeller ſubmits his title to the inſpection of the purchaſer, who exerciſes his own, or ſuch other judgment as he confides in on the goodneſs of the title: but though it ſhould turn out to be defective, the purchaſer has no remedy, unleſs he take a ſpecial covenant or warranty; provided there be no fraud practiſed on him to induce him to purchaſe. If there be, as is ſaid, many frauds practiſed in the trade of hops, that may require more caution on the part of the buyers to protect themſelves by taking warranties; but that will not affect the preſent contract, which was no more than that the bulk ſhould agree with the ſample; which it was proved to do at the time of the ſale: and as the ſeller undertook for nothing more, he cannot be anſwerable in this caſe."

Le Blanc, J. "The inclination of my mind, at the trial, was, that the jury ſhould find for the plaintiff; becauſe the drawing of freſh ſamples, or the inſpection of the commodity itſelf in bulk, would have afforded no information to the buyers, as to the latent defects which afterwards appeared: and therefore it occurred to me that as there was no want of prudence on the part of the buyer, and the defect was of ſuch a nature, that no inſpection of the thing could have led to a diſcovery of it, the law would on that account raiſe an implied undertaking on the part of the ſeller, that it was a merchantable commodity, ſuch as it appeared then to be. But upon further conſideration, as the ſame rule which applies to other caſes muſt govern this; and as in the only inſtance in which the ſame queſtion has come directly in judgment, namely in ſales of horſes, it has been conſidered, that without a warranty of ſoundneſs by the ſeller, or fraud on his part, the buyer muſt ſtand to all loſſes ariſing from latent defects; and as I ſee no ground for diſtinguiſhing between this caſe and thoſe; and no inſtance has been produced in which a contrary rule

rule has been laid down in reſpect of any other commodity; I therefore concur with my brothers, that there ſhould be a new trial."

Lord *Ellenborough*, Ch. J. then obſerved, that as he had been concerned in the cauſe he had forborne taking any part in the deliberation with the reſt of the Court; but having now heard their opinions, he muſt declare his entire concurrence with them in the judgment they had delivered.

So, in a ſale of pictures, the putting down the name of an artiſt in a catalogue, as the painter of any picture, is not ſuch a warranty as will ſubject the party ſelling to an action, if it turns out that he might be miſtaken, and that it was not the work of the artiſt to whom it was attributed.

Thus, in the caſe of *Jeudwine* v. *Slade*, (o) which was an action brought to recover damages on the ſale of two pictures, one of which was ſaid to be a *ſea piece* by *Claud Loraine*, the other a *fair* by *Teniers*, which the defendant had ſold to the plaintiff as originals, when in fact they were copies. The defence relied on was, that they were ſold under a catalogue, not amounting to an abſolute warranty, but upon which the buyer was to exerciſe his own judgment; and further, that a bill had been filed by the defendant two years ago to compel the plaintiff to complete the ſale; to which he had put in no anſwer, but paid the money, and that he therefore could not now ſeek to reſcind the contract after ſuch acquieſcence. The plaintiff's counſel anſwered this objection by inſiſting that the name of the artiſt put oppoſite any picture in a catalogue was a warranty; and if the article ſold did not correſpond with it it avoided the ſale; and as to the tranſaction, in reſpect to paying the money, that the plaintiff was deceived, but had brought his action as ſoon as he diſcovered the fraud.

Several of the moſt eminent artiſts and picture dealers were called, who differed in their opinion reſpecting the originality of the pictures. When the evidence was cloſed Lord *Kenyon*, Ch. J. ſaid: "It was impoſſible to make this the caſe of a warranty; the pictures were the work of artiſts ſome centuries back, and there being no way of tracing the picture itſelf, it could only be matter of opinion, whether the picture in queſtion was the

(o) 2 *Eſp. Rep.* 572.

work

work of the artiſt, whoſe name it bore or not. What then does the catalogue import? That, in the opinion of the ſeller, the picture is the work of the artiſt whoſe name he has affixed to it. The action, in its preſent ſhape, muſt go on the ground of ſome fraud in the ſale: but if the ſeller only repreſents what he himſelf believes, he can be guilty of no fraud. The catalogue of the pictures in queſtion leaves the determination to the judgment of the buyer, who is to exerciſe that judgment in the purchaſe. With reſpect to the bringing of the action, his lordſhip added, that if any fraud has been committed in a ſale, if the party comes recently after diſcovery of the deception, he is not barred by circumſtances having taken place ſuch as were ſtated."

The ſeller of a ſhip is bound to diſcloſe to the buyer all latent defects known to him at the time of the ſale.

Thus, in the caſe of *Melliſh* and another v. *Motteux* and others, (*p*) the firſt count of the declaration ſtated, that, in conſideration the plaintiff would buy of the defendants a brig, together with all the rigging, &c. belonging thereto, the defendants undertook and promiſed the plaintiff *that the brig was free from all latent and concealed defects*. The count then ſtated, that ſhe was not free from latent and concealed defects; and that the defendants, at the time of the promiſe, well knew the ſame.

At the trial it was proved, that the plaintiff bought the brig "with all faults;" and not a word was ſaid, at the time, as to her condition; but that, on examination and taking out the ballaſt, it was diſcovered that twenty-two of her futtocks were broken, and that had ſhe gone to ſea in that condition, her deſtruction would have been the inevitable conſequence: that this was a latent defect which it was impoſſible for any perſon to have diſcovered in the ſtate the ſhip was at the time of the purchaſe; *and that the defendants knew of it.*

For the defendants it was objected, that this was a caſe where the rule *caveat emptor* applied; that the plaintiffs bought the brig for better, for worſe, and could not now get off their bargain. But Lord *Kenyon*, Ch. J. ſaid, "There are certain moral duties, which philoſophers have called duties of imperfect obligation; ſuch as benevolence to the poor, and many others, which courts of

(*p*) *Peake's Cas. N. P.* 115.

law do not enforce: but in contracts of all kinds it is of the higheſt importance that courts of law ſhould compel the obſervance of honeſty and good faith. This was a latent defect, which the plaintiffs could not, by any attention whatever, poſſibly diſcover, and which the defendants knowing of, ought to have diſcloſed to the plaintiffs. The terms to which the plaintiffs acceded, of taking the ſhip with all faults and without warranty, muſt be underſtood to relate only to thoſe faults which the plaintiffs could have diſcovered, or which the defendants were unacquainted with.

2. *Of Contracts of Warranty upon the Sale of Cattle, as to Title, Quality, or Soundneſs, &c.*]—If there be a communication between *A.* and *B.* for the buying of ſheep, and thereupon *B.*, the vendor, ſays they are his own ſheep, when in truth they are the ſheep of another, and *A.* buys them of *B.*, an action lies againſt *B.*, though he made not any expreſs warranty of the ſheep. (*q*)

So, if *A.* ſells ſheep, and warrants that they are ſound, and ſhall continue ſo for a year after, this is good, and ſhall bind him. (*r*)

The words of a warranty ſhall have a reaſonable conſtruction; as (*s*) if a man take ſheep to depaſture, and warrant that he will keep them ſound in his land, that ſhall be intended that his paſture ſhall not infect them; but an action does not lie if they were unſound at the time of the warranty.

If a perſon ſells a horſe, affirming it to have been his from a colt, when it was not, an action lies for this deceit. (*t*)

So, if a man ſell unto another a horſe, and warrant it to be ſound and good, &c. if the horſe be lame or diſeaſed that he cannot work, the buyer ſhall have an action upon the caſe againſt the ſeller. (*u*)

But it is ſaid, that unleſs the ſeller expreſsly warrant the horſe to be ſound, no action will lie: for if he ſell it without ſuch warranty, it is at the buyer's peril, and his eyes ought to be his judges in that caſe. (*v*)

So, a general warranty will not extend to guard againſt defects that are plainly and obviouſly the object of one's ſenſes; as if

(*q*) 1 *Rol. Abr.* 90. *pl.* 6. *Cro. Jac.* 474. (*r*) 1 *Dan. Abr.* 188.
(*s*) 1 *Rol. Abr.* 97. *pl.* 4. (*t*) 1 *Rol. Abr.* 91. *l.* 10.
(*u*) *F. N. B.* 94. C. 1 *Rol. Abr.* 96. *Doug.* 18.
(*v*) *F. N. B.* 94. C. *Bridg.* 127.

a horſe be warranted perfect, and wants either a tail or an ear, unleſs the buyer in this caſe be blind. But if cloth is warranted to be of ſuch a length, when it is not, there an action on the caſe lies for damages; for that cannot be diſcerned by ſight, but only by a collateral proof, the meaſuring of it. (*w*) Alſo if a horſe is warranted ſound, and he wants the ſight of an eye, though this ſeems to be the object of one's ſenſes, yet, as the diſcernment of ſuch defects is frequently a matter of ſkill, it hath been held that an action on the caſe lieth to recover damages for this impoſition. (*x*)

Thus, in the caſe of *Butterfield* v. *Burroughs*, (*y*) the plaintiff declared that the defendant ſold him a horſe ſuch a day, and at ſuch a place, and then and there warranted the ſaid horſe to be ſound, wind and limb; whereupon he paid his money, and avers the horſe had but one eye, &c. The defendant pleaded *non warrantizavit*, upon which there was a verdict for the plaintiff: but in arreſt of judgment, it was objected, firſt, that the want of an eye was a viſible thing; whereas the warranty extends only to ſecret infirmities. To this, however, it was anſwered, and reſolved by the Court, that this might be ſo, and muſt be intended to be ſo, ſince the jury had found the defendant did warrant. The ſecond objection was, that the warranty, as is here ſet forth, might be at a time after the ſale; whereas it ought to be part of the very contract; and therefore it is always alleged *warrantizando vendidit. Sed non allocatur*; for the payment was afterwards, and it was that which completed the bargain, which would have been imperfect without it.

So, if *A.* ſells a horſe to *B.* and warrants him to be ſound wind and limb, and clean of legs, whereas he well knows that he is ſhoulder pitched, and has ſplints upon his legs, an action lies againſt him upon this warranty; for theſe imperfections are not ſubject to the view of an unſkilful perſon. (*z*)

But a warranty that a horſe is ſound, is not falſified by its labouring under a temporary injury happening from an accident.

(*w*) *Finch L.* 189. 3 *Bl. Com.* 165. *bis.* (*x*) *Ibid.*
(*y*) 1 *Salk.* 211. *Et vide* 2 *Roll. Rep.* 5. *Bridg.* 128. *Cro. Jac.* 387. 3 *Bulſt.* 95. 3 *Keb.* 101. *F. N. B.* 94. C. *n. c.*
(*z*) 1 *Rol. Abr.* 97. *pl.* 14.

Thus, in the case of *Garment* v. *Barrs*, (*a*) which was an action of *assumpsit* on a warranty of a mare sold by the defendant to the plaintiff. The declaration stated, that in consideration that the plaintiff, at the special instance and request of the defendant, had bought of him a certain mare of great value, the defendant undertook and promised the plaintiff that she was sound, &c.

At the trial, the first witness called on the part of the plaintiff proved the sale, and that the defendant warranted her to be sound: but he said further, that, upon the plaintiff observing that she went rather lame of one leg, the defendant said that that had been occasioned by her taking up a nail at the farrier's; and except as to that lameness, she was perfectly sound.

The counsel for the defendant contended that the plaintiff should be nonsuited on the ground of a variance. He observed, that the plaintiff had declared upon a warranty in general terms, that the mare was sound; whereas the warranty proved in evidence was, with an exception of the lameness of the foot. This, he contended, was a fatal variance. But *Eyre*, Ch. J. said, "A horse labouring under a temporary injury or hurt, which is capable of being speedily cured or removed, is not for that an unsound horse; and where a warranty is made that such a horse is sound, it is made without any view to such injury; nor is a horse so circumstanced an unsound horse within the meaning of the warranty. I am of opinion, that to make the exception such as ought to have been stated in the declaration, as a qualification of the general warranty, so as to make a fatal variance between the warranty really made, and that stated in the declaration, the injury the horse had sustained, or the malady under which he laboured, ought to be of a permanent nature, and not such as arose from a temporary injury or accident."

So, if a man not knowing the age of a horse, but having a written pedigree which he received with him, sell him as a horse of the age stated in the pedigree, at the same time stating he knows nothing of him but what he has learned from the pedigree, he is not liable to an action, though it afterwards appear that the pedigree is false.

(*a*) 2 *Esp. Rep.* 673.

Thus,

Thus, in the caſe of *Dunlop* v. *Waugh*, (*b*) which was an action of *aſſumpſit* on a promiſe that a horſe, bought by the plaintiff of the defendant, was only eight years old, when, in fact, he was fourteen. The defendant, when he ſold the horſe, ſhowed the plaintiff a written pedigree, which he had received with him from the perſon of whom he had bought him, and ſaid that he ſold the horſe according to that pedigree, knowing nothing of him further than he had learnt therefrom, the mark being out of his mouth when he had bought him. The pedigree was clearly proved to be falſe, but the defendant had no knowledge of this when he ſold the horſe.

Lord *Kenyon*, Ch. J. was clearly of opinion "that this was no warranty. The defendant related all he knew of the horſe, and did not enter into any expreſs undertaking that the horſe was of the age ſtated in the pedigree, but ſtated the contents of that, which the plaintiff relied on."

If a horſe is ſold warranted ſound, which it can be clearly proved was unſound at the time of ſale, the ſeller is liable to an action on the warranty, without either the horſe being returned, or notice given of the unſoundneſs.

Thus, in the caſe of *Fielder* v. *Starkin* (*c*) which was an action of *aſſumpſit* on the warranty of a mare, "*that ſhe was ſound, quiet, and free from vice and blemiſh.*"

On the trial it appeared, that the plaintiff had bought the mare in queſtion of the defendant, at *Winnel* fair, in the month of *March*, 1787, for thirty guineas; and that the defendant warranted her ſound, and free from vice and blemiſh.—Soon after the ſale, the plaintiff diſcovered that ſhe was unſound and vicious, but kept her three months after this diſcovery, during which time he gave her phyſic, and uſed other means to cure her. At the end of the three months he ſold her; but ſhe was ſoon returned to him as unſound. After ſhe was ſo returned, plaintiff kept her till the month of *October*, 1787, and then ſent her back to the defendant as unſound, who refuſed to receive her. On her way back to the plaintiff's ſtable the mare died; and, on her being opened, it was the opinion of the farriers that ſhe had been unſound a full twelvemonth before her death. It alſo appeared that the plaintiff

(*b*) *Peake's Cas. Ni. Pri.* 123. (*c*) 1 *H. Bl.* 17.

and defendant had been often in company together during the interval between the month of *March*, when the mare was ſold to the plaintiff, and *October*, when he ſent her back to the defendant; but it did not appear that the plaintiff had ever, in that time, acquainted the defendant with the circumſtance of her being unſound. The jury found a verdict for the plaintiff, with thirty guineas damages; but the defendant afterwards obtained a rule *niſi* for the plaintiff to ſhow cauſe why the verdict ſhould not be ſet aſide, and a nonſuit entered, upon the ground that the horſe had not been returned, nor any notice given to the defendant of the unſoundneſs.

The Court, however, after argument, diſcharged the rule, and determined that it was not neceſſary either to return the horſe, or give notice of its unſoundneſs.

Lord *Loughborough*, Ch. J. ſaid, "Where there is an expreſs warranty, the warrantor undertakes that it is true at the time of making it. If a horſe, which is warranted ſound at the time of ſale, be proved to have been at that time unſound, it is not neceſſary that he ſhould be returned to the ſeller. No length of time elapſed after the ſale will alter the nature of a contract originally falſe; neither is notice neceſſary to be given; though the not giving notice will be a ſtrong preſumption againſt the buyer that the horſe, at the time of the ſale, had not the defect complained of, and will make the proof on his part much more difficult. The bargain is complete, and if it be fraudulent on the part of the ſeller, he will be liable to the buyer in damages, without either a return or notice. If, on account of a horſe warranted ſound, the buyer ſhould ſell him again at a loſs, an action might, perhaps, be maintained againſt the original ſeller, to recover the difference of the price. In the preſent caſe it appears, from the evidence of the farriers who ſaw the mare opened, that ſhe muſt have been unſound at the time of the ſale to the plaintiff."

Gould, J. was of the ſame opinion; and ſaid he remembered many caſes of expreſs warranty, where a return was not held to be neceſſary.

Heath, J. ſaid, "If this had been an action for money had and received to the plaintiff's uſe, an immediate return of the mare would have been neceſſary; but as it is brought on the expreſs warranty, there was no neceſſity for a return, to make the defendant liable."

But

But if a warranty be accompanied with an undertaking on the part of the ſeller to take the horſe again, and pay back the purchaſe money, if on trial he ſhall be found to have any of the defects mentioned in the warranty, the buyer muſt return the horſe as ſoon as he diſcovers any of thoſe defects, in order to maintain an action on the warranty, unleſs he has been induced to prolong the trial by any ſubſequent miſrepreſentation of the ſeller. In ſuch caſe the term *trial* means a reaſonable trial.

Thus, in the caſe of *Adam* v. *Richards*, (*d*) which was an action of *aſſumpſit* on the following warranty:

"*London*, 6th *December*, 1791.

"Received of *John William Adam*, Eſq. ninety guineas, for a "pair of brown bay coach geldings, which I warrant perfectly "ſound, free from blemiſh, and in no manner vicious: and if, on "trial, they ſhould have any of the beforementioned faults, I "agree to take theſe horſes again, and allow Mr. *Adam* his purchaſe money.

"*John Richards.*"

Soon after the ſale it was diſcovered that one of the horſes was vicious and reſtive in harneſs; and there was evidence that he was ſo at the time of the ſale. Of this the plaintiff informed the defendant, but continued to keep the vicious horſe for ſeveral months, partly from the perſuaſion of the defendant, and partly from his own ſuppoſition that the horſe would improve, and go better as he was more uſed. The plaintiff afterwards turned the horſe out to graſs for ſome weeks, and then ſent him to the defendant, who ſupplied another for a temporary purpoſe, till a better could be procured to match the remaining one of the pair. After this the plaintiff took the reſtive horſe again from the defendant, and returned him the borrowed one, the defendant ſaying that the reſtive horſe would then go very well: and it was not till ſome days after this, namely, on the 23d of *July*, 1795, that the plaintiff finally returned the pair to the defendant, and demanded back the purchaſe money.

On this evidence a verdict having been found for the defendant the counſel for the plaintiff moved for a new trial, relying on the caſe of *Fielder* v. *Starkin*, (*e*) to ſhow, that as there was an

(*d*) 2 *H. Bl.* 573. (*e*) *Ante*, 277.

expreſs warranty, and as the horſe appeared to have been reſtive at the time of the ſale, it was not neceſſary that he ſhould be returned, to make the defendant liable to an action on the warranty. But the *Court* ſaid, that though they fully aſſented to the doctrine laid down in *Fielder* v. *Starkin*, yet, where there was an agreement to take a horſe back, if on trial he ſhould be found faulty, though it wereacco mpanied with an expreſs warranty, it was incumbent on the purchaſer to return the horſe, as ſoon as the faults were diſcovered, unleſs the ſeller, by any ſubſequent miſrepreſentation, induced the purchaſer to prolong the trial; that a trial meant a reaſonable trial; but here, ſix months had elapſed after the horſe was known to be reſtive, and before the return. The verdict, therefore, was proper, and ought not to be ſet aſide.

So, where a horſe is ſold by public auction, and one of the conditions of ſale is, *that the purchaſer of any horſe warranted ſound, who ſhall conceive the ſame to be unſound, ſhall return him within two days, otherwiſe he ſhall be deemed ſound:* If the buyer neglects to return the horſe within the time allowed, no action will lie on the warranty.

Thus, in the caſe of *Meſnard* v. *Aldridge*, (*f*) where it appeared that a horſe was ſold by the defendant, by auction, at his repoſitory, and warranted ſound. The ſale took place on the *Wedneſday*. At the time of the ſale the auctioneer announced that the conditions of the ſale were as uſual. Theſe conditions of ſale were proved to be contained in a printed paper, paſted up under the auctioneer's box; and by one of them, "all horſes purchaſed "there, in caſe of any unſoundneſs diſcovered, are required to be "returned before the evening of the ſecond day after the ſale."

The horſe in queſtion was not returned till the *Saturday*. When returned by the plaintiff, he was informed that it was too late, as he ought purſuant to the conditions of the ſale, to be returned on the evening of *Friday*.

For the plaintiff it was contended, that there was no evidence of notic of the conditions of the ſale ſufficient to bind him; that the auctioneer had not proclaimed them publicly; ſo that the plaintiff might have been ignorant that he purchaſed under ſuch

(*f*) 3 *Eſp. Rep.* 271.

conditions;

conditions: but, at all events, he contended, that if the defendant, who was not the owner of the horſe, had not paid over the price, (which if he had, he admitted that he would not have been liable,) that he remained ſubject to this action on the warranty.

But Lord *Kenyon*, Ch. J. ſaid, "In this caſe it is proved, that printed particulars of the ſale are paſted up in the public ſale-room, under the auctioneer's box. In the caſe of carriers, who advertiſe that they will not be liable for goods loſt above the value of 5*l.* unleſs entered as ſuch, the poſting up of a bill in the coach-office to that effect has been held to be ſufficient. I therefore think the ſame mode being adopted here, gives the ſame degree of notice to all perſons who come to this ſale; and that it is a ſufficient notice of the conditions under which the horſes are ſold.

"With reſpect to the main point, when parties enter into a ſpecial agreement, they muſt adhere to the terms of it. Here there is a condition that the party purchaſing muſt return the horſe within two days; which he has not done. I therefore think the plaintiff muſt be nonſuited."

But (*g*) if a horſe ſold at a public auction be warranted ſound, and ſix years old, and it be one of the conditions of ſale that he ſhall be deemed ſound, unleſs returned within two days, this condition applies only to the warranty of *ſoundneſs*. Therefore, where a horſe ſold with ſuch a warranty was diſcovered to be twelve years old ten days after the ſale, and was then offered to the ſeller, who refuſed to take him, it was holden that an action might be maintained by the buyer againſt the ſeller; and his right to recover is not affected by his having ſold the horſe after offering him to the defendant.

Lord *Kenyon*, Ch. J. in this caſe, ſaid, "The condition of ſale muſt be confined ſolely to the circumſtance of *unſoundneſs*. There is good ſenſe in making ſuch a condition at public ſales; becauſe, notwithſtanding all the care that can be taken, many accidents may happen to the horſe between the time of ſale and the time when the horſe may be returned, if no time were limited: but the circumſtance of the age of the horſe is not open to the ſame difficulty."

(*g*) Buchanan v. Parnſhaw, 2 *Term Rep.* 745.

So,

So, if cattle or goods are ſold and delivered upon a warranty of ſoundneſs, or other particular quality, if the buyer diſcovers the warranty to be untrue, he muſt immediately return the thing bought to the ſeller; otherwiſe he will be liable to an action for the price agreed on; and he cannot defend himſelf upon the ground of the warranty being untrue: for where the buyer keeps the thing bought, his only remedy in ſuch caſe is by action for damages upon the warranty.

Thus, in the caſe of *Curtis* v. *Hannay*, Bart. (*b*) which was an action of *aſſumpſit* to recover the price of an horſe ſold by the plaintiff to the defendant, who was an officer in the life-guards.

The horſe having been warranted, the defence ſet up was, that the warranty had not been complied with, the horſe having defective eyes when ſold: but it appeared in evidence that the defendant had been informed of the defect in the eyes the day after he bought the horſe, but that he kept it near ſeven weeks afterwards before he returned it; and, in the courſe of which time, ſuſpecting the horſe had ſome defect in his feet, he had applied a bliſter and ſome other medicines to the part: this produced a diſorder called a thruſh, and a conſiderable degree of lameneſs: it was, however, only a temporary lameneſs, and the horſe recovered of it; and it was in evidence that the remedies applied to the leg and foot could not have affected the eyes. Upon theſe facts being proved, Lord *Elden*, Ch. J. ſaid, "He thought the matter ſet up by the defendant was no defence to the action: it appeared that the horſe had defective eyes when ſold; and that that defect was made known to the buyer a very ſhort time after he had purchaſed him. Inſtead of returning him immediately, the defendant doctored him: this produced a new diſorder, which the horſe had not when ſold. The queſtion was, would the horſe, when returned to the ſeller, be diminiſhed in value by this doctoring? If he would, his lordſhip ſaid he thought the defendant ſhould pay the price, and bring his action againſt the ſeller for any defect in the warranty exiſting at the time of the ſale. He took it to be clear law, that if a perſon purchaſes an horſe which is warranted, and it afterwards turn out that the horſe was unſound at the time of the warranty, the buyer might, if he pleaſed, keep

(*b*) 3 *Eſp. Rep.* 82.

the

the horſe, and bring an action on the warranty, in which he would have a right to recover the difference between the value of a ſound horſe and one with ſuch defects as exiſted at the time of the warranty; or he might return the horſe, and bring an action to recover the full money paid; but in the latter caſe the ſeller had a right to expect that the horſe ſhould be returned in the ſame ſtate he was when ſold, and not by any means diminiſhed in value; for, his lordſhip ſaid, if a perſon keeps a warranted article for any length of time after diſcovering its defects, and when he returns it, it is in a worſe ſtate than it would have been if returned immediately after ſuch diſcovery, I think the party can have no defence to an action for the price of the article, on the ground of non-compliance with the warranty, but muſt be left to his action on the warranty to recover the difference in the value of the article warranted, and its actual value when ſold. And his lordſhip concluded with ſaying, that if the jury thought that if any future purchaſer was to be told that the horſe had been bliſtered and doctored it would diminiſh its value in the eſtimation of ſuch purchaſer, they ſhould find a verdict for the plaintiff, which they accordingly did for forty-five guineas, the price agreed upon.

So, in the caſe of *Grimaldi* v. *White*, (*i*) which was an action of *aſſumpſit* for work and labour, &c. The defendant paid a certain ſum of money into court, and pleaded the general iſſue of *non aſſumpſit*. The action was brought by the plaintiff, who was a miniature painter, to recover the value of ſeveral pictures painted by him for the defendant. Upon the trial it was proved, that the plaintiff painted miniatures of different ſizes; according to which the prices varied. Specimens were hung up in his apartment, numbered; and the prices put oppoſite to the number. The price oppoſite No. 8. was fifteen guineas; which number the defendant had had. The pictures had been ſent home; and the defendant, at the time, objected to the execution, as being inferior to the ſpecimen exhibited by the plaintiff; but he had not returned them. The defence, upon which it was intended to rely, was this inferiority of execution; and of courſe of value; and the defendant's counſel were proceeding to call witneſſes, who were judges, and who had ſeen the pictures, to

(*i*) 4 *Eſp. Rep.* 95.

prove,

prove, that at fifteen guineas they were infinitely overcharged; and to aſcertain what was the real value. This, (however,) was objected to by the plaintiff's counſel. And *Lawrence*, J., before whom the cauſe was tried, ſaid: "In this caſe it is in evidence, that the charges of the plaintiff are regulated by the different ſizes of the pictures, which he exhibits as ſpecimens of his art, and for which he charges the different ſums ſet oppoſite to the numbers. It is proved, that he has delivered ſeveral pictures to the defendant of the ſize which he ordered; and which the defendant received, and has not returned. The defendant relies on the circumſtances, that they are of an execution very inferior to the ſpecimens exhibited, and which the plaintiff undertook to paint conformable to. Where an artiſt exhibits ſpecimens of his art and ſkill as a painter, and affixes a certain price to them, if a perſon is induced to order a picture from an approbation of ſuch ſpecimens, and the execution of it, when delivered, is inferior to the ſpecimen exhibited, he has a right to refuſe to receive it, or return it, as not being conformable to that performance which the painter undertook to execute: but if he means to avail himſelf of that objection, he muſt return the pictures; he muſt reſcind the contract totally. Having received it under a ſpecific contract, he muſt either abide by it, or reſcind it *in toto*, by returning the thing ſold; but he cannot keep the article received under ſuch a ſpecific contract, and for a certain price; and pay for it at leſs price than that charged by the contract." The plaintiff accordingly had a verdict for the full charge.

3. *Of Contracts of Warranty of Title, &c. upon the Sale of Lands, Tithes, Annuities, &c.*] If the vendor of an eſtate warrant that he has a good title to it, when he has no title, the vendee may maintain an action of *aſſumpſit* againſt him on ſuch warranty. (*k*)

So, if on a treaty for the purchaſe of a houſe, the defendant affirms the rent to be 30*l. per annum*, whereas in truth it is but 20*l.*, and thereby the plaintiff is induced to give ſo much more than the houſe is worth, the defendant is liable to an action; for the value of the rent is matter that lies in the private know-

(*k*) *Vide Mo.* 126. 1 *Salk.* 210. *Com. Dig. tit.* Action upon the Caſe for a Deceit, A. 8.

ledge

ledge of the landlord and tenant; and if they affirm the rent to be more than it is, the purchaſer is cheated, and ought to have a remedy for it. (*l*)

So, (*m*) if a man ſell tithes, knowing that he had no right to them, an action on the caſe in nature of deceit will lie.

But where the plaintiff declared, (*n*) that whereas queen *Elizabeth* was ſeiſed in fee of the advowſon of the vicarage of *S.*, whereto the tithes in *S.* did belong; and that the defendant, upon the 9th of *June*, did affirm himſelf to be lawful incumbent thereof, and that he had right to the tithes from the death of *T. V.* the incumbent, (who died 16th *April* preceding;) whereupon the plaintiff, on the 16th of *June*, having a communication with the defendant about his buying the ſaid tithes till *Michaelmas* following, the defendant *adtunc ſciens*, that he had no right thereto (he not having been inſtituted, &c.) yet *falsè & deceptivè* ſold them to the plaintiff, for 30*l.* and alleges, *in facto*, that *E. T.* was afterwards preſented, &c. and took the tithes, &c.

The Court determined that no action would lie upon a mere affirmation that a party is owner or proprietor of an eſtate, of which he is not at the time in poſſeſſion; but there muſt be an expreſs covenant or warranty for the enjoyment. In the preſent caſe, therefore, judgment was given for the defendant.

So, if the plaintiff declares, that upon a communication between the plaintiff and the defendant, for the purchaſe of a certain term for years, which the defendant then had in certain lands, the defendant aſſerted to the plaintiff that the ſaid term was worth 150*l.* to be ſold; to which the ſaid plaintiff *fidem adhibens* did give the defendant 150*l.* for the ſame; and that afterwards the plaintiff, offering the ſaid term to ſale, could not get ſo much for the ſame; the action does not lie; for here was only a naked affirmation of the defendant that the term was worth ſo much; and it was the plaintiff's folly to believe him (*o*)

An action will lie to recover the expences of the conveyances, and the intereſt of the money procured to purchaſe an annuity,

(*l*) 1 *Sid.* 146. 1 *Lev.* 102. 1 *Salk.* 211. (*m*) *Mo.* 467.
(*n*) Rolwell v. Vaughan, *Cro. Jac.* 196. *Mo.* 467. *S. C.*
(*o*) Harvey v. Young, *Telv.* 20. *See alſo* 1 *Sid.* 146. *S. P.*

where

where the grantor has misrepresented the charges affecting the estate to be charged with the annuity.

Thus, in the case of *Richards* v. *Barton*, (*p*) the declaration stated, that the defendant, in consideration of 3200*l.* to be to him paid, had agreed to grant to the plaintiff a certain annuity of 400*l. per annum*, charged upon a certain estate of his, the defendant's, and that he had represented that the said estate was affected with only one judgment for 1000*l.* payable to his brother; that on this representation the plaintiff agreed to purchase the said annuity; that the deeds and conveyances necessary were accordingly prepared; and the plaintiff had procured the said sum of money for that purpose. It then averred, that, before the said deeds were executed, it appeared that the premises were charged with a further judgment of 5000*l.*; in consequence of which, the plaintiff declined to proceed further in the purchase; and the action was brought to recover the expences of the conveyance, and the interest of the money from the time the plaintiff had prepared it till the treaty was at an end.

For the defendant it was replied, first, that it was incumbent on the plaintiff to have searched for judgments before any of the deeds or conveyances were put in hand, or any expence incurred on that account; and that, on the same principle, the plaintiff should not have come forward with his money, so as to charge the defendant with any interest, until he had seen a clear and indisputable title: and as to the charge of the latter judgment, they gave in evidence that they had offered to have satisfaction entered upon that judgment, but it was by power of attorney from the person who had the judgment, and who was then abroad.

For the plaintiff it was proved, by the attorney employed by him, that he had received an abstract of the defendant's title to the estate about to be charged with the annuity, which mentioned but one charge of 1000*l.* to his brother; that, upon his inquiring if there were any other judgments affecting the estate, the defendant assured him there were none; that he therefore did not then search for judgments, but deferred it till the execution of the deeds, to save a double search.

Lord *Kenyon*, Ch. J. ruled, that the plaintiff was clearly entitled to recover: his lordship said, "that an abstract ought to

(*p*) 1 *Esp. Rep.* 268.

mention

mention every incumbrance whatever affecting an eſtate, upon which any ſecurity was about to be placed; and ſhould therefore contain an account of every judgment by which the eſtate was affected; that the abſtract, therefore, in this caſe was objectionable in that reſpect; nor was the objection removed by the offer to have ſatisfaction acknowledged under a power of attorney, as that was liable to objection; and it had been decided by lord *Hardwicke*, that a party was not bound to accept of any conveyance, or any agreement executed under ſuch circumſtances; that, with reſpect to the ſearching for judgments, the conduct of the plaintiff's attorney had been perfectly proper: for, as it was abſolutely neceſſary to ſearch for judgments immediately, before the conveyances were executed, leſt ſome judgments ſhould have been entered up during the treaty, that he had aſſigned a very proper reaſon for not having done ſo at firſt, namely, the plaintiff's aſſertion that no judgment did in fact ſubſiſt, charging the eſtate, except one for 1000*l.* before mentioned, and as it ſaved expence of a double ſearch for judgments."

For more concerning Warranty, &c. and when the Conſideration Money may be recovered back, vide ante, p. 75. tit. *Money Had and Received.*

CHAPTER

CHAPTER IX.

Of the Bailment of Goods with Carriers, Wharfingers, Warehouſemen, &c.

THE term *Bailment* ſignifies a delivery of goods on a contract or condition, *expreſſed* or *implied*, that they ſhall be reſtored by the bailee to the bailor, or according to his directions, as ſoon as the purpoſe for which they were bailed ſhall be anſwered. (*a*) Now there are ſeveral ſpecies of bailment.

Lord *Holt*, in the caſe of *Coggs* v. *Bernard*, (*b*) ſays, "There "are ſix ſorts of bailment. The firſt ſort is, a bare naked bail- "ment of goods delivered by one man to another, to keep for "the uſe of the bailor; and this I call a *depoſitum*; and it is "that ſort of bailment which is mentioned in *Southcote's* caſe. (*c*.) "The ſecond ſort is, when goods or chattels that are uſeful are "lent to a friend gratis, to be uſed by him; and this is called "*commodatum*, becauſe the thing is to be reſtored in *ſpecie*. The "third ſort is, when goods are left with the bailee to be uſed "by him for hire. This is called *locatio et conductio*, and the "lender is called *locator*, and the borrower *conductor*. The fourth "ſort is, when goods or chattels are delivered to another as a "pawn, to be a ſecurity to him for money borrowed of him by "the bailor; and this is called, in Latin, *vadium*, and in Engliſh "a pawn or a pledge. The fifth ſort is, when goods or chattels "are delivered to be carried, or ſomething is to be done about "them for a reward to be paid by the perſon who delivers them "to the bailee, who is to do the thing about them. The ſixth "ſort is, when there is a delivery of goods or chattels to ſome-

(*a*) *Vide* Jones's Law of Bailments, *p.* 1. 117. (*b*) 2 *Ld. Raym.* 912.
(*c*) 4 *Co.* 84.

body

" body, who is to carry them, or do ſomething about them gratis, " without any reward for ſuch his work or carriage."

But Sir *William Jones*, in his learned treatiſe (*d*) on this ſubject, acknowledges but five ſpecies of bailment; and, in commenting upon Lord *Holt*'s diviſion of this ſubject, he ſays: " His diviſion of bailments into *ſix* ſorts appears, in the firſt place, a little inaccurate; for, in truth, his fifth ſort is no more than a branch of his third, and he might, with equal reaſon, have added a ſeventh, ſince the fifth is capable of another ſubdiviſion, I acknowledge, therefore, but five ſpecies of bailment; which I ſhall now enumerate and define, with all the Latin names, one or two of which Lord *Holt* has omitted. 1. *Depoſitum*, which is a naked bailment, without reward, of goods to be kept for the bailor. 2. *Mandatum*, or commiſſion; when the mandatary undertakes, without recompence, to do ſome act about the things bailed, or ſimply to carry them; and hence Sir *Henry Finch* divides bailment into two ſorts, to keep and to employ. 3. *Commodatum*, or loan for uſe; when goods are bailed, without pay, to be uſed for a certain time by the bailee. 4. *Pignori Acceptum*, when a thing is bailed by a debtor to his creditor in pledge, or as a ſecurity for the debt. 5. *Locatum*, or hiring, which is always for a reward; and this bailment is either, 1. *Locatio rei*, by which the hirer gains the temporary uſe of the thing; or 2. *Locatio operis faciendi*, when work and labour, or care and pains are to be performed or beſtowed on the thing delivered; or 3. *Locatio operis mercium vehendarum*, when goods are bailed for the purpoſe of being carried from place to place, either to a public carrier, or to a private perſon."

In another part of Sir *William Jones*'s treatiſe, (*e*) this laſt ſpecies of bailment is thus defined, " *Letting to hire* is, 1ſt, *A bailment of a thing to be uſed* by the hirer for a compenſation in money; or 2dly, *A letting out of work and labour to be done*, or *care and attention to be beſtowed* by the bailee on the goods bailed, and that for a pecuniary recompence; or 3dly, *Of care and pains in carrying the things delivered* from one place to another for a ſtipulated or implied reward."

In the preſent chapter it is intended to treat chiefly upon the fifth ſpecies of bailment. The ſubject, however, will be conſi-

(*d*) *Page* 35. (*e*) *Page* 118.

dered under the following heads:

1. *Of the Bailment of Goods with Common Carriers by Land.*
    1. *Of the General Liability of Common Carriers.*
    2. *Who ſhall be deemed a Common Carrier.*
    3. *What ſhall be a ſufficient Delivery to, and Acceptance by Carriers.*
    4. *Of a Special or Conditional Acceptance of Goods under a Particular Notice, &c.; and of the Carrier's Liability or Exemption in Reſpect thereof.*
    5. *In what Caſes a Carrier is bound to Deliver Goods to the Premiſes of the Conſignee.*
    6. *By and againſt whom the Action ſhould be brought; and of the Form of Action againſt a Carrier in Caſe of Loſs or Damage of Goods.*
    7. *Of the Carrier's Lien on Goods.*
2. *Of the Bailment of Goods with Common Carriers by Water.*
    1. *Of the General Liability of Maſter and Owner.*
    2. *Of a Delivery and Acceptance of Goods under a Bill of Lading, in a General Ship.*
    3. *Of a Special Acceptance of Goods, without a Bill of Lading.*
    4. *When the Reſponſibility of the Maſter and Owner Begins and Determines; and in what Caſes they are either Wholly or in Part exempt from making good a Loſs or Damage, &c.*
3. *Of the Bailment of Goods with Private Carriers either With or without Reward.*
4. *Of the Bailment of Goods to be Kept either with or Without Reward.*
    1. *Of Bailment of Goods with Private Perſons.*
    2. *Of Bailment of Goods with Wharfingers.*
    3. *Of Bailment of Goods with Warehouſemen.*
5. *Of the Bailment of Goods upon a Letting to Hire where they are either to be uſed, or ſome Labour is to be Performed upon them, &c.*

1. *Of*

1. *Of the Bailment of Goods with Common Carriers by Land.*

1. *Of the General Liability of Common Carriers.*] A common carrier for hire is reſponſible for the loſs or damage of goods entruſted to his care for ſafe delivery in all caſes, except where it happens from the act of *God*, or of the King's enemies. (*f*)

It has been frequently obſerved, (*g*) that rigorous as this rule may ſeem, and hard as is it may be in one or two particular inſtances, yet it is founded on the great principle of public policy and convenience, to which all private conſiderations ought to yield; for the public are obliged to rely on the good conduct of carriers, whoſe education and morals are uſually none of the beſt, and who might have frequent opportunities of aſſociating with wicked and diſhoneſt perſons, while the injured perſon could ſeldom or never obtain legal proof of ſuch combinations, or even of their *negligence*, if no actual fraud had been committed by them, to the infinite injury of commerce, and extreme inconvenience of ſociety.

Accordingly it is laid down in the books, (*b*) that though a common carrier be robbed of the goods delivered to him, he ſhall anſwer for the value of them.

So, a carrier is conſidered in the nature of an *inſurer*, and is liable for the loſs of goods occaſioned by fire, without any negligence in him or his ſervants.

Thus, in the caſe of *Forward* v. *Pittard*, (*i*) which was an action of *aſſumpſit* againſt the defendant as a common carrier, for not ſafely carrying and delivering the plaintiff's goods. A verdict was found for the plaintiff ſubject to the opinion of the Court of *King's Bench* on the following caſe:

" That the defendant was a common carrier from *London* to *Shaftſbury*. That on *Thurſday* the 14th of *October*, 1784, the plaintiff delivered to him on *Weyhill* twelve pockets of hops to

(*f*) *Vide* 1 *Rol. Abr.* 2. *C.* 4 *Co.* 84. 2 *Ld. Raym.* 918. 1 *Term Rep.* 27.

(*g*) *Vide* 1 *Salk.* 143. 2 *Ld. Raym.* 918. *Jones's Law of Bailments*, 103, 4. 95, 6.

(*b*) 1 *Inſt.* 89. *a. Mo.* 462 1 *Rol. Abr.* 2. *C.* (*i*) 1 *Term Rep.* 27. *See alſo* Hyde v. the Trent and Merſey Navigation Company, 5 *Term Rep.* 389. *et poſt*, S. P.

be carried by him to *Andover*, and to be by him forwarded to *Shaftſbury* by his public road waggon, which travels from *London* through *Andover* to *Shaftſbury*. That by the courſe of travelling, ſuch waggon was not to leave *Andover* till the *Saturday* evening following. That in the night of the following day after the delivery of the hops, a fire broke out in a booth at the diſtance of one hundred yards from the booth in which the defendant had depoſited the hops, which burnt for ſome time with unextinguiſhable violence, and during that time communicated itſelf to the ſaid booth in which the defendant had depoſited the hops, and entirely conſumed them *without any actual negligence in the defendant*. That the fire was not occaſioned by lightning."

The general queſtion in this caſe was, whether a carrier was liable for the loſs of goods occaſioned by fire, without any negligence in him or his ſervants?

Lord *Mansfield*, Ch. J. delivered the unanimous opinion of the Court, that the carrier was liable. He ſaid: "It appears from all the caſes for one hundred years back, that there are events for which the carrier is liable independant of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is ſuable on his contract. But there is a further degree of reſponſibility by the cuſtom of the realm, that is, by the common law; a carrier is in the nature of an inſurer. It is laid down that he is liable for every accident, except by the act of *God*, or the King's enemies. Now what is the act of *God?* I conſider it to mean ſomething in oppoſition to the act of man: for every thing is the act of *God* that happens by his permiſſion; every thing by his knowledge. But to prevent litigation, colluſion, and the neceſſity of going into circumſtances impoſſible to be unravelled, the law preſumes againſt the carrier, unleſs he ſhows it was done by the King's enemies, or by ſuch act as could not happen by the intervention of man, as ſtorms, lightning, and tempeſts.

"In this caſe it does not appear but that the fire aroſe from the act of ſome man or other. It certainly did ariſe from ſome act of man; for it is expreſsly ſtated not to have happened by lightning. The carrier therefore, in this caſe, is liable, inaſmuch as he is liable for inevitable accident."

But in the caſe of *Garſide* v. *The Proprietors of the Trent and Merſey*

Merſey Navigation, (*k*) where a common carrier, between *A.* and *B.* was employed to carry goods from *A.* to *B.* to be forwarded to *C.*; the goods were ſafely delivered by him at *B.*, and there put into his warehouſe, until they could be delivered to another carrier from *B.* to *C.*; but whilſt the goods were in the warehouſe, they were deſtroyed by an accidental fire; the Court of *King's Bench* determined, that whilſt the goods remained in the warehouſe the carrier was to be conſidered merely as a warehouſeman, and therefore not reſponſible for the loſs.

The facts of the caſe were ſhortly theſe: Four pockets of hops, directed to the plaintiff at *Stockport*, were delivered to the defendants to be carried by them from *Stourport* to *Mancheſter*; that they arrived ſafe at *Mancheſter* on the 30th of *September*, were that evening put into the defendants' warehouſe there, where (together with other goods) they were conſumed by an accidental fire that night, and before any carrier came from *Stockport*, to whom they could be delivered. It alſo appeared, that, according to the courſe of buſineſs, when goods are ſent from *Stourport* to go beyond *Mancheſter*, if any carrier to the place of their deſtination be at *Mancheſter* ready to receive them, they are immediately delivered upon payment of the carriage from *Stourport* to *Mancheſter*; and if not, the defendants keep them in their warehouſe till a carrier arrive to whom they may be delivered on making the above payment, the defendants not charging any thing for lodging and keeping the goods in their warehouſe. Sometime before the goods in queſtion were delivered to the defendants, their agent told the plaintiff, that if he would ſend all his goods by them they would forward them to *Stockport* by the firſt carrier that ſhould come there, without inſiſting on being paid for the carriage before they delivered them, and would ſettle with him when they met.

Lord *Kenyon*, Ch. J. ſaid: "If the defendants were conſidered merely as warehouſemen, there would be no pretence to ſay, that they were liable for ſuch an accident as the preſent. The caſe of a carrier ſtands by itſelf upon peculiar grounds; he is held reſponſible as an inſurer, and the reaſon given in the books (whether well or ill founded is immaterial here) is to prevent fraud. But I do not ſee how we can couple the character of the carrier

(*k*) 4 *Term Rep.* 581. *Vide the caſe of* Hyde *v.* the Trent and Merſey Navigation Company, 5 *Term Rep.* 389. *et poſt.*

with that of the warehouſeman, in which laſt the defendants are not liable here, they not having been guilty of laches."

Buller, J. "The keeping of the goods in the warehouſe is not for the convenience of the carrier but of the owner of the goods; for when the voyage to *Mancheſter* is performed, it is the intereſt of the carrier to get rid of them directly; and it was only becauſe there was no perſon ready at *Mancheſter* to receive theſe goods that the defendants were obliged to keep them."

It is ſaid, (*l*) that it has been determined, that if a man travel in a ſtage-coach, and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not abſolved from his reſponſibility, but will be liable if the portmanteau be loſt.

2. *Who ſhall be deemed a Common Carrier.*] All perſons carrying goods for hire, as maſters and owners of ſhips and other veſſels, lightermen, proprietors of waggons, &c. come under the denomination of common carriers, and are chargeable, on the general cuſtom of the realm, for their faults and miſcarriages in the loſs or damage of goods entruſted to their care. (*m*)

So, if the proprietor of a ſtage-coach carries goods as well as paſſengers for hire, he ſhall be deemed a common carrier, and liable for the loſs of goods, &c. (*n*)

But, a *hackney coachman* is not a common carrier within the cuſtom of the realm, and cannot be charged for the loſs of a paſſenger's goods, except there be an expreſs agreement, and money paid for the carriage of the goods. (*o*)

So, the poſtmaſter-general doth not come under the denomination of a carrier: (*p*) he hath no hire; enters into no contract. The poſt-office is a branch of revenue, and a branch of police created by Act of Parliament; the ſalary annexed to the office of poſt-maſter, is for no other conſideration than the trouble of executing it. He is, therefore, not liable for any conſtructive negligence.

(*l*) *Per* Chambre, *J.* 2 *Bos. & Pul.* 419. *See alſo* Robinſon *v.* Dunmore, *Ib.* 416. *et poſt.* (*m*) 1 *Salk.* 249. *Bac. Abr. tit.* Carriers, A.
(*n*) 2 *Sho.* 128. *Salk.* 282. *pl.* 11. (*o*) *Com. Rep.* 25.
(*p*) Lane *v.* Cotton, 1 *Ld. Raym.* 646. Whitfield *v.* Ld. Le Deſpencer, *Cowp.* 754.

3. *What*

3. *What ſhall be a ſufficient Delivery to and Acceptance by Carriers.*] Leaving goods in an inn-yard from whence a carrier ſets out, is no delivery to the carrier.

Thus, in the caſe of *Selway* v. *Holloway*, (*q*) where it appeared that a parcel of hops were left at the inn where *Holloway* lodged, without proving any delivery to *Holloway* or his ſervant; but only to a woman, (who had ſerved *Holloway* before, but had quitted his ſervice for five years,) who ſaid to the carman, if he laid them down *Holloway* would find them. And upon the trial it was proved, that there were many carriers, who lodged at the ſame inn, but none of them went out the ſame day.

A verdict was found for the defendant, and upon a motion for a new trial, the Court were all of opinion, that the hops could not be ſaid to be delivered to *Holloway*; and therefore a new trial was denied.

But, if goods are delivered to a carrier's ſervant or agent, whom he appoints to receive goods for him, this is a ſufficient delivery to, and acceptance of them by the carrier.

4. *Of a Special or Conditional Acceptance of Goods under a Particular Notice, and of the Carrier's Liability or Exemption in Reſpect thereof.*] A common carrier, who accepts a box with goods and money in it, is liable to the full extent of the loſs or damage happening to them, though he be ignorant of its contents; unleſs he make a ſpecial acceptance.

Thus, in the caſe of *Kenrig* v. *Eggleſton*, (*r*) which was an action upon the caſe againſt a country carrier for not delivering a box with goods and money in it. The evidence was, that the plaintiff delivered the box to the carrier's porter, whom he appointed to receive goods for him, and told the porter that there was a book and tobacco in the box, and in truth there was an hundred pounds in it beſides. And it was agreed by the counſel, and given in charge to the jury, that if a box with money in it be delivered to a carrier, he is bound to anſwer for it if he be robbed, although it was not told him what was in it. And ſo it was ruled in one *Barcroft*'s caſe, as *Roll* ſaid, where a box of jewels was delivered to a ferry-man, who knowing not what was in it, and being in a tempeſt, threw it overboard into the ſea, and reſolved that he ſhould anſwer for it.

(*q*) 1 *Ld. Raym.* 46. (*r*) *Alcyn*, 93.

Roll, J. directed the jury, "That although the plaintiff did tell him of ſome things in the box only, and not of the money, yet he muſt anſwer for it; for he need not tell the carrier all the particulars in the box. But it muſt come on the carrier's part to make ſpecial acceptance. But in reſpect of the intended cheat to the carrier, he told the jury they might conſider him in damages."

To prevent this general liability, therefore, the carrier may make a ſpecial acceptance of the goods; but he muſt in ſuch caſe expreſs with certainty under what circumſtances, and to what extent he will be liable in caſe of loſs or damage.

Thus, in the caſe of Sir *Joſeph Tyly* and others v. *Morrice*, (*s*) two bags of money ſealed up were delivered to the defendant's book-keeper; the plaintiff's ſervant told him that it was 200*l.*, and deſired a receipt for the money; thereupon the book-keeper gave a receipt for his maſter to this effect: "Received of, &c. "two bags of money ſealed up, ſaid to contain 200*l.*, which I pro-"miſe to deliver on ſuch a day at *Exeter* unto *T. Davis*, he to pay "10*s. per cent* for carriage and riſk."

The carrier was robbed of this and other money on *Hounſlow Heath* in the night time, but he paid 200*l.* to *Davies* at *Exeter*. And now an action was brought againſt him in common form upon the cuſtom of *England*, wherein the plaintiffs declared, that on ſuch a day and place they had delivered unto the defendant 450*l.* to be carried from *London* to *Exeter*, &c.; and at the trial it was proved, that there was full 450*l.* in gold and ſilver contained in thoſe two bags at the time they were delivered to the carrier for 200*l.* And the queſtion was, whether the carrier ſhould anſwer for the whole money? *Holt*, Ch. J. was of opinion that he ſhould anſwer for no more than 200*l.*, (which was acknowledged that he had paid to *Davies*,) becauſe in this caſe there was a particular undertaking by the carrier for the carriage of 200*l.* only, and his reward was to extend no farther than that ſum, and it is the reward which makes the carrier anſwerable; and ſince the plaintiffs had taken this courſe to defraud the carrier of his reward, they had thereby barred themſelves of that remedy which is founded only on the reward. So the jury was directed to find for the defendant.

(*s*) *Carth.* 85.

It

It has alſo been holden, (*t*) that if a box is delivered generally to a carrier, and he accepts it, he is anſwerable, though the party did not tell him there was money in it. But if the carrier aſks, and the other ſays no, or if he accepts it conditionally, provided there is no money in it, in either of theſe caſes the carrier is not liable.

So, in the caſe of *Gibbon* v. *Paynton* and another (*v*) which was an action againſt the *Birmingham* ſtage-coachman, for 100*l.* in money, ſent from *Birmingham* to *London* by his coach, and loſt. It was hid in hay, in an old nail-bag, the bag and the hay arrived ſafe: but the money was gone. The coachman had inſerted an advertiſement in a *Birmingham* newſpaper, with a *nota bene*, "That the coachman would not be anſwerable for any money "or jewels, or other valuable goods, unleſs he had notice that it "was money or jewels, or valuable goods, that was delivered "to him to be carried." He had alſo diſtributed hand-bills of the ſame import. It was notorious in that country, that the price of carrying money from *Birmingham* to *London* was 3*d.* in the pound, the plaintiff was a dealer at *Birmingham*, and had frequently ſent goods from thence: it was proved that he had been uſed for a year and a half to read the newſpaper in which this advertiſement was publiſhed; though it could not be proved that he had ever actually read or ſeen the individual paper wherein it was inſerted. A letter of the plaintiff's was alſo produced, from whence it manifeſtly appeared that he knew the courſe of this trade, and that money was not carried from that place to *London* at the common and ordinary price of the carriage of other goods: and it likewiſe appeared from this letter, that he was conſcious that he could not recover, by reaſon of his concealment. The jury found a verdict for the defendant. But the plaintiff afterwards moved for a new trial; the Court, (however,) were clearly of opinion, that the verdict was right, and therefore refuſed the rule. Lord *Manſfield*, Ch. J. diſtinguiſhed between the caſe of a common carrier, and that of a bailee, and ſaid: "The latter is only obliged to keep the goods with as much diligence and caution as he would keep his own: but a common carrier, in reſpect of the premium he is to receive, runs the riſk of them, and muſt make good the loſs, though it happen without any fault of his; the reward making him anſwerable for their

(*t*) *Per* King, *Ch. J.* 1 *Stra.* 145. (*v*) 4 *Burr.* 2298.

ſafe

ſafe delivery. This action is brought againſt the defendant upon the foot of being a common carrier. His warranty and inſurance is in reſpect of the reward he is to receive: and the reward ought to be proportionable to the riſk, if he makes a greater warranty and inſurance, he will take greater care, uſe more caution, and be at the expence of more guards, or other methods of ſecurity: and therefore he ought, in reaſon and juſtice to have a greater reward. Conſequently, if the owner of the goods has been guilty of á fraud upon the carrier, ſuch fraud ought to excuſe the carrier, and here the owner was guilty of fraud upon him: the proof of it is over-abundant. The plaintiff is a dealer at *Birmingham*, the price of the carriage of money from thence is notorious in that place: it is the rule of every carrier there; it is fairly preſumed that a man converſant in a trade knows the terms of it; therefore the jury were in the right, in preſuming that this man knew it; the advertiſement and handbills were circumſtances proper to be left to the jury, the plaintiff's having been uſed, for a year and a half, to read this newſpaper is a ſtrong circumſtance for the jury to ground a preſumption that he knew of the advertiſement, then his own letter ſtrongly infers his conſciouſneſs of his own fraud, and that he meant to cheat the carrier of his hire, therefore, I entirely agree with the jury in their verdict."

Yates, J. held: "That a carrier may make a *ſpecial* acceptance; and that this was a ſpecial acceptance. By the general cuſtom of the realm, a common carrier inſures the goods at all events: and it is right and reaſonable that he ſhould do ſo: But he may make a ſpecial contract; or he may refuſe to contract in extraordinary caſes but upon extraordinary terms."

So, in the caſe of *Clay* v. *Willan* and others. (*u*) The defendants were proprietors of a ſtage coach, by which the plaintiff ſent a quantity of light guineas to be carried from *Wakefield* to *London*, 2*s*. were paid for the carriage, and 2*d*. for booking; the following were the printed terms on which the defendants performed their buſineſs.

"*Willan* and Co. humbly beg leave to inform their friends "and the public, that caſh, plate and jewels, writings, or any "ſuch kind of valuable articles, will not be accounted for if

(*u*) 1 *H. Bl.* 298.

"loſt

" loſt, of more than 5*l.* value, unleſs entered as ſuch, and a " penny inſurance paid for each pound value, when delivered to " the book-keeper, or other perſon in truſt, to be conveyed by " any carriage that inns at the above inn."

The action was in the uſual form againſt common carriers, and the plea, the general iſſue. No money was paid into court. At the trial, the plaintiff was nonſuited, it being proved that the perſon, by whom he ſent the parcel to the inn, knew of the above terms, but had not diſcovered the contents of the parcel to the book-keeper, nor paid for them as valuables. And, upon a rule to ſhow cauſe why the nonſuit ſhould not be ſet aſide, and a verdict entered for the plaintiff, on the ground that he was entitled to recover as far as 5*l.* by the printed conditions, the Court declared, that the ſenſe of the printed conditions ſeemed to be, that the defendants were not liable to any extent, unleſs the parcel had been entered and paid for as valuable; and therefore the rule for ſetting aſide the nonſuit was diſcharged.

So, in the caſe of *Izett* v. *Mountain*, (*w*) where the notice was in theſe words; " The proprietors of coaches from this inn will " not be accountable for any parcels, &c. of more value than 5*l.*, " unleſs entered as ſuch, and paid for accordingly;" it was determined, in an action againſt the carrier, that the plaintiff was not entitled to recover any thing.

So, in the caſe of *Nicholſon and another* v. *Willan* and another, (*x*) where it appeared, that the defendants were proprietors of two coaches travelling from *Leeds*, through *Nottingham*, to *London*, the one a mail coach, the other a heavy coach which went out ſix hours later every day than the mail coach. The parcel in queſtion, containing goods to the value of 58*l.* was, (as a witneſs for the plaintiffs proved, and which the jury found to be true,) delivered and accepted to be carried by the mail coach. It appeared, however, to have been booked to go by the heavy coach, and to have been afterwards loſt, but whether in a courſe of conveyance by the heavy coach, or out of the warehouſe, or how otherwiſe did not appear. It was proved, that the defendants had, for ſome time before, put up an advertiſement on a board in their office at *Nottingham*, and of which the plaintiffs were alſo proved to have had notice, in the following terms: " Take notice, that the proprie-

(*w*) 4 *Eaſt Rep.* 371. (*x*) 5 *Eaſt Rep.* 507.

" tors

" tors of coaches tranſacting buſineſs at this office will not be " accountable for any paſſenger's luggage, money, plates, jewels, " watches, writings, goods, or any package whatever, (if loſt " or damaged,) above the value of 5*l.*, unleſs inſured and paid " for at the time of delivery, and demanded in one month, after " ſuch damage is ſuſtained."

Lord *Ellenborough*, Ch. J. delivered the judgment of the court upon this caſe, in favour of the defendants. He ſaid, " On the part of the plaintiffs it was contended that they were entitled to recover the 58*l.* the value of the goods, notwithſtanding the notice given by the advertiſement, which excludes from the carrier's general reſponſibility for the ſame, at common law, all goods above the value of 5*l.* unleſs the terms therein ſpecified, namely, of inſuring and paying for the goods at the time of delivery, ſhould be complied with, and which was not done in this inſtance. The ground on which they ſo contended was, that the loſs in queſtion was not incurred in the courſe of their employment as carriers, but occaſioned by an act of tortious converſion, in direct contravention of the terms on which the goods were delivered to, and accepted by them. But to found this argument there was no other evidence but the mere fact of the booking of the goods for a different coach, and a ſubſequent non-delivery, which can amount to no more than a negligent diſcharge of duty in their character of carriers, and not to an entire renunciation of that character, and of the duties attached to it, ſo as to make them guilty of a diſtinct tortious misfeazance, in reſpect to the goods in queſtion.

It was alſo contended, on the part of the plaintiffs, that ſuch a ſpecial acceptance of goods, by a common carrier, as is contained in the defendant's notice, is contrary to the policy of the common law, which has made common carriers reſponſible, to an indefinite extent, for loſſes not occaſioned by the only excepted cauſes of loſs, viz. " the act of God, and the king's enemies." But conſidering the length of time during which, and the extent and univerſality in which the practice of making ſuch ſpecial acceptances of goods, for carriage by land and water, has now prevailed in this kingdom, under the obſervation, and with the allowance of courts of juſtice, and with the ſanction alſo and countenance of the legiſlature itſelf, which is known to have rejected a bill brought in for the purpoſe of narrowing the carrier's reſponſibility

reſponſibility, in certain caſes, on the grounds of ſuch a meaſure being unneceſſary, in as much as the carriers were deemed fully competent to limit their own reſponſibility in all caſes by ſpecial contract: conſidering alſo, that there is no caſe to be met with in the books, in which the right of a carrier thus to limit, by ſpecial contract, his own reſponſibility, has ever been, by expreſs deciſion, denied we cannot do otherwiſe than ſuſtain ſuch a right in the preſent inſtance, however liable to abuſe and productive of inconvenience it may be; leaving to the legiſlature, if it ſhall think fit, to apply ſuch remedy hereafter as the evil may require. In the abſence, therefore, of any evidence to ſupport the plaintiff's claim, as founded upon a ſuppoſed tortious converſion of the goods in queſtion, and of any valid objection, in point of law, to the ſpecial terms of acceptance contained in the defendant's, the carrier's, notice, we cannot help giving effect to thoſe terms in the notice; by which, in as much as the goods in queſtion were above the value of 5*l.* and not inſured and paid for at the time of delivery, the plaintiffs are not accountable for the ſame: and of courſe the verdict, even for the 5*l.* muſt be ſet aſide, and a non-ſuit entered."

But in all caſes of notice, it is neceſſary for the carrier to be be prepared to prove, that the notice was put up in ſome conſpicuous part of his office, in clear and legible characters, ſo that the party delivering the goods might have ſeen and known of it.

Thus, in the caſe of *Clark* v. *Gray*. (*y*) The plaintiff proved that ſhe had taken her place at the *Bell Savage* inn, ſlept there at night, and brought her box with her to the inn: it was marked "Paſſenger," on the lid. On the next morning the coach ſet off: the guard did not take his place behind. When the coach came to *Iſlington* the guard announced to the paſſengers that the parcels had been loſt; and Mrs. *Clark*'s trunk among the reſt.

It was ſtated, by the counſel for the plaintiff, that the defence relied on was, that the owners had given notice that they would not be liable for any parcel of above 5*l.* value, unleſs paid for as ſuch. He then contended, that this notice applied to the caſe of goods only ſent to be carried, and not to the caſe of paſſengers' luggage.

(*y*) 4 *Eſp. Rep.* 177.

Lord

Lord *Ellenborough*, Ch. J. ſaid, "that it had been decided, that the luggage of paſſengers came within the exception."

The counſel for the defendant ſaid, that notice had been given, by hand-bills, and by a large board put up in the coach-office; in the following terms:

"Take notice, no more than 5*l.* will be accounted for any goods "or parcels delivered at this office, unleſs entered as ſuch, and "paid for accordingly."

It was then contended by the plaintiff's counſel, that it did not appear that the plaintiff was apprized of this notice, or knew of it in any way whatever. But it was anſwered that Judge *Buller* had laid it down that all the coaches in the kingdom had adopted the notice for their own ſecurity, it was the duty of the paſſengers to make the inquiry; and the inn-keeper might rely on the general notice.

Lord *Ellenborough*, Ch. J. ſaid, "I think where the party has taken the precaution mentioned, it is preſumptive notice to all perſons. In a caſe from *Lancaſter*, where it was publiſhed in the county paper, that perſons in a particular manufactory would claim a lien on goods ſent to be manufactured; it was adjudged, by ſuch publication in a newſpaper, to be a ſufficient notice; but I muſt ſee that the defendant did uſe ſuch precaution, and give ſuch notice. With reſpect to its being the general uſage of all the inn-keepers, I think that is not evidence. Carriers are ſubjected to loſſes by the general law of the realm: I therefore think that every man muſt diſcharge himſelf by notice given by himſelf; and that it was incumbent on him to prove that ſuch notice was given in this caſe."

The defendant then proved, that the above notice was ſtuck up on a board, in large letters, and in a conſpicuous part of the coach-office; and this was deemed a ſufficient notice to the plaintiff.

In the caſe of *Yate* v. *Willan*, (z) it was held, that the payment of money into court upon a count, ſtating a ſpecial contract, is an admiſſion of ſuch contract, and narrows the inquiry to the quantum of damages ſuſtained by the breach thereof. Therefore, if

(z) 2 *Eaſt Rep.* 128. *See alſo* Clarke v. Gray, 6 *Eaſt Rep.* 564. *where it was determined that the* 5*l. may be recovered upon a declaration, drawn in the common form, without ſtating the notice as part of the contract.*

the

the plaintiff declares, as upon a general undertaking by the defendant to carry goods for hire, on which the defendant pays 5*l.* into court, the latter cannot give in evidence that the contract was that he ſhould not be anſwerable for goods loſt to a greater value than 5*l.* unleſs entered and paid for accordingly; though, if no money had been paid into court, the plaintiff muſt have been nonſuited on ſuch evidence.

5. *In what Caſes a Carrier is bound to deliver Goods, &c. to the Premiſes of the Conſignee.*]—If a common carrier uſually keeps a porter, by whom he ſends out the goods to be delivered to the perſons to whom the ſame are directed, and receives porterage for the goods, he is bound to deliver them ſafely to the houſe of the conſignee.

Thus, in the caſe of *Golden* v. *Manning* and *Peyton*, (*a*) where the following facts were ſtated for the opinion of the Court: "The defendants were common carriers from *Birmingham* to *London*; that on the 7th day of *June*, 1771, they received a box, containing two pieces of ſilk, conſiſting of 119 yards, directed to Mr. *Samuel Ireland*, *Princes-ſtreet*, *Spital fields*, *London*; that the box came to the defendant's warehouſe, in *London*, on the 8th of *June* following, with no legible directions upon it, where it remained for the ſpace of a year; at which time the plaintiff and *Ireland*, ſettling their accounts together, diſcovered the miſtake of this box having been ſent by the *Birmingham* coach, and of its not being delivered: upon which the plaintiff and *Ireland* went to the warehouſe, and found the box; and, upon opening it, a letter of advice from the plaintiff to him (*Ireland*) was found therein; and the ſilks then appeared to be damaged to the amount of 29*l.* 14*s.*; and for that reaſon plaintiff and *Ireland* refuſed to take the box and ſilks upon their being offered to them; and the defendant, *Manning*, refuſed to make any ſatisfaction for the damage; that the defendants, before the ſaid time, neither delivered the goods, nor gave any intelligence to *Ireland* of the arrival of the box at the warehouſe; that the name of *Samuel Ireland*, and place of his abode appear in a printed book, being a directory, containing the names and places of abode of merchants

(*a*) 3 *Wilſ.* 429. 2 *Bl. Rep.* 916. *S. C. See alſo the caſe of* Hyde *and another* v. The *Trent* and *Merſey Navigation Company*, *poſt*, *where three of the Judges thought the carrier was bound to deliver the goods to the owner; but Lord* Kenyon, *Ch. J. inclined to a contrary opinion.* 305

and traders, which book they, the defendants, had in their warehouſe; that the way bill in the defendant's cuſtody and poſſeſſion contained the name of *Samuel Ireland*, and no further directions; that no inquiry was made at the defendant's warehouſe at *Birmingham* of the plaintiff, to know where *Ireland* lived; nor was any inquiry made according to the directory; and that defendants hire a porter, at a ſtated ſalary by the week, to carry out goods which come by their coach, and receive the porterage of ſuch goods as are ſent out by the ſaid porter."

The Court were of opinion that the plaintiff was entitled to recover. They ſaid, "We are to determine this caſe upon the facts and particular circumſtances therein ſtated; ſo there is no neceſſity for us to conſider of the laws in general reſpecting carriers. It is ſtated to us, that theſe defendants hire a porter, at a ſtated ſalary by the week, to carry out goods which come by their coach, and receive the porterage of ſuch goods as are ſent out by that porter; therefore we apprehend we are bound to ſay, that the defendants were obliged to ſend the goods by their porter to be delivered at *Samuel Ireland's houſe in Princes-Street, Spittal-Fields*, according to the direction, and the promiſe and undertaking laid in the declaration; as the defendants conſtantly kept a porter for this purpoſe, they engaged, and ſpecially undertook (in this particular caſe) to deliver the goods to Mr. *Ireland*, by their porter. There can be no doubt but carriers are obliged to ſend notice to perſons to whom goods are directed, of the arrival of thoſe goods within a reaſonable time, and muſt take ſpecial care that the goods be delivered to the right perſon. It was by the negligence of the defendants that the direction of the box was obliterated. The maſter of a ſtage-coach takes a greater price for the carriage of goods than other carriers; ſo is certainly bound either to ſend out the goods from his warehouſe, in *London*, to be delivered to the perſons to whom the ſame are directed, or to ſend notice of the arrival thereof within a reaſonable time. If the defendants in this caſe were to be aſked, in what manner they uſually deliver goods at *London*, they would anſwer, "We always keep a porter at *London*, by whom we ſend out the goods to be delivered to the perſons to whom the ſame are directed." Our opinion is confined to this particular caſe only.

The ſame point alſo came before the court in the caſe of *Hyde* and

and another *v. Trent* and *Merſey* Navigation Company; (*b*) where it appeared, upon the trial, that the goods were put on board the defendant's barges, at the reſpective places mentioned in the declaration, and conveyed therein along the defendant's navigation, and the Duke of *Bridgewater*'s canal, to *Manchester*, where they were landed upon the quay, and lodged there, in the duke of *Bridgewater*'s warehouſe, in which place they were conſumed, by an accidental fire, the ſame night. In the bills made out by the defendants, there were charges of ſo much for tonnage on the river *Trent*, ſo much for tonnage on the *Trent* and *Merſey* navigation, ſo much for the Duke of *Bridgewater*'s canal, ſo much for warehouſe room for the Duke of *Bridgewater*; beſides which, in the bill for the fourteen bags was a charge for cartage, which was intended for the cartage from the Duke of *Bridgewater*'s warehouſe to the plaintiff's own warehouſe, in *Manchester*, and which was paid by the plaintiffs when the goods were put on board the defendant's barges: but the charge for warehouſe room was merely received by the defendants as agents to the *duke*, and they had no ſhare of the profit. It appeared alſo to be the practice of many perſons in *Manchester*, for whom goods were brought by the defendants, to ſend their own carts for the goods from the quay or warehouſe; but the uſage had uniformly been for the cotton merchants to have their goods conveyed to their warehouſe in carts, furniſhed by the defendants. Formerly the defendants employed their own carts for this purpoſe, but had latterly given up this buſineſs, together with the profits ariſing from it, to a perſon of the name of *Hibbert*, who was their book keeper; and the plaintiffs knew that the cartage had been received for this man. Previous to this tranſaction the defendants had circulated the following printed notice: "Navigation from the *Trent* to the "*Merſey*. Conveyance of goods by land and navigation, to and "from *London*, *Manchester*, *Warrington*, *Liverpool*, *Cheſter*, moſt "parts of the North, the *Staffordſhire* potteries, and their enviſions. The proprietors having hitherto laboured under ſeveral "inconveniences, to make this conveyance worthy the attention "of merchants, &c. have at length removed every obſtacle, and "can now promiſe to deliver goods each way in ten days, with

(*b*) 5 *Term Rep.* 389. *See alſo* Forward *v.* Pittard, *ante*, 291. *S. P. Vide ſtat.* 26 *Geo.* 3. *c.* 86. *ſ.* 2. *which exonerates the owner from all liability in caſe of loſs happening by fire on board a ſhip, &c.*

" the utmoſt punctuality, and at a much reduced price to an " inland conveyance," &c. Since this tranſaction, upon the arrival of the goods, &c. at the quay at *Mancheſter*, the defendants have ſent written notices of the ſame to the owners, deſiring them to order the goods away as ſoon as poſſible, as they remained at the riſk of the owners.

Upon theſe facts, a verdict was found for the plaintiff. A motion was afterwards made for a rule to ſet aſide the verdict, upon the ground that the defendant's reſponſibility ceaſed upon the arrival of the goods at *Mancheſter*; and the goods having been ſafely depoſited in the warehouſe, the defendants were not bound to ſee them ſafely delivered to the houſe of the plaintiff. The Court would not decide upon this general queſtion; but determined that, under the particular circumſtances of the caſe, the defendants were liable; and therefore refuſed to grant a new trial. The Judges, however, in giving their opinions, ſpoke at large upon the general queſtion, and delivered their opinions *ſeriatim* as follow:

Lord *Kenyon*, Ch. J. ſaid, " This is a queſtion of very general concern; ſince few days in the year occur in which caſes do not ariſe that may depend upon it; and therefore it were to be wiſhed that this caſe ſhould have called for a deciſion upon the point, which ſhould have left no doubt in future reſpecting the extent to which common carriers are liable. *But peculiar circumſtances exiſt in this caſe, which render it unneceſſary to decide the general queſtion*; though as the whole has been argued at the bar, I will give my opinion on the general, as well as the particular queſtion made. I lay no ſtreſs on the circumſtance ſo much relied on, that the defendants named themſelves on their card, " carriers by land and navigation:" that was introduced in order to advertiſe the public that they would carry the whole diſtance from *London* to the moſt extreme point, including, in ſeveral places, intervals by land between one navigable cut and another: this, therefore, could have no reference to the article of cartage from the navigation at *Mancheſter* to the plaintiff's warehouſe. On the point of law the rule is too clear to admit of any doubt; the only queſtion is reſpecting the application of the facts in this caſe to it, whether, at the time when the accident happened, the goods were in the cuſtody of the defendants as common carriers; becauſe, if they were, by the ſtrict rules of law the defendants are reſponſible, carriers being inſurers in all caſes except in two. That the

plaintiff's goods were in the cuſtody of the defendants, as carriers, when they were navigated on their own canal, there is no doubt: it is equally clear that they were ſo during the time when they were on the duke of *Bridgewater*'s canal, which is open to the public, they paying the *duke* tonnage on it. It is as clear that when the goods arrived at *Mancheſter* they were unloaded with due care and circumſpection, and depoſited in the duke of *Bridgewater*'s warehouſe. After this a further act was to be done: the goods were to have been taken away in carts, but not by the defendants; for, though they formerly kept carts, and carried away the goods of their cuſtomers to their reſpective houſes, for ſome time paſt they had ceaſed to have any concern with the carts, or to derive any advantage from cartage whatever; the carts themſelves, and all the benefit ariſing from that part of the buſineſs, belonging to *Hibbert*. If, indeed, there had been any fraud in this tranſaction, as if the defendants had induced the public to believe that they would be reſponſible in all caſes, and, in order to execute themſelves, had relied on ſome ſecret agreement between them and *Hibbert*, that might have varied the caſe: but, in the firſt place, we cannot preſume fraud; and, in the next, there are no facts in this caſe from which we could preſume it. If the defendants here be liable, conſider how far the liability of carriers will be extended: it will affect the owners of ſhips bringing goods from foreign countries to merchants in *London*. Are they bound to carry the goods to the warehouſes of the merchants here, or will they not have diſcharged their duty on landing them at the wharf to which they generally come? It would be ſtrange, indeed, if the owners of a *Weſt Indiaman* were held liable for any accident that happened to goods brought by them to *England*, after having landed them at their uſual wharf. The inſtance of game, which has been mentioned at the bar, ſhews the general ſenſe and underſtanding of the public on this ſubject. The different claims of the reſpective perſons concerned are ſeparately marked on the direction. The carrier who receives a certain ſum for carrying the game, is not bound, in conſideration of that ſum, to deliver the goods; he has performed his duty when he has brought the game to the inn where he puts up; then the buſineſs of the porter begins. I am not aware that it has ever been decided that it is the duty of the carrier to deliver ſuch goods at the houſe of every individual perſon to whom they are directed: if it has, the action brought by Mr.

Price againſt the keeper of the *Bell* Inn was miſconceived; it ſhould have been brought againſt the carrier, and not the inn-keeper: and yet it did not occur to the defendant's counſel, in that caſe, to make ſuch an objection. When goods are ſent by a coach, a letter of advice ſhould alſo be ſent to the perſon to whom they are directed, that he may ſend for them; or the price which the porter expects to receive for delivering them will induce ſuch porter to carry them; but the carriage and porterage conſtitute diſtinct charges."

"In this caſe, however, there is one peculiar circumſtance which makes it unneceſſary to decide the general queſtion; and that is, the charge made by the defendants in one of their bills for the cartage at *Mancheſter*: for that charge the defendants undertook to deliver the goods. Therefore, without deciding the general queſtion, I think that the plaintiffs are entitled to the verdict which they have obtained. *On the general point I have great doubts; the leaning of my mind, at preſent, is, that carriers are not liable to the extent contended for.*"

Aſhhurſt, J. "I am glad to find one circumſtance which puts the caſe out of all doubt, namely, that one of the bills contains a charge for wharfage and cartage; which is deciſive to ſhow, that in this caſe the liability of the defendants continued till the goods were delivered. Had it not been for this circumſtance, I ſhould have deſired further time to conſider the caſe. The inclination of my opinion, on the general queſtion, is, that a carrier is bound to deliver the goods to the perſon to whom they are directed. A contrary deciſion would be highly inconvenient, and would open a door to fraud; for if the liability of the carrier were to ceaſe when he had brought the goods to any inn where he might chuſe to put up his coach, and a parcel, containing plate or jewels, brought by him, were loſt before it was delivered to the owner, the latter would only have a remedy againſt a common porter. It has been ſaid, however, that it is the practice of many perſons to ſend to the inn for their goods; but that does not prove that the carrier is not bound to deliver them if they do not ſend. If the owner chuſe to ſend for his goods, that merely diſcharges the carrier from his liability in that caſe; it only diſpenſes with the general obligation thrown by the law upon the carrier; but it does not apply to other caſes where that obligation is not diſpenſed with

with. But on this queſtion I do not mean to give any decided opinion."

Buller, J. "Upon the general queſtion, my opinion coincides with that given by my brother *Aſhburſt*; and, according to the defendant's own argument, great inconveniences would reſult to the public from adopting any other rule. According to their argument, there muſt be two contracts in all caſes where goods are ſent by a coach or a waggon: but I think the ſame argument tends to eſtabliſh the neceſſity of three; one with the carrier, another with the innkeeper, and a third with the porter. But, in fact, there is but one contract: there is nothing like any contract, or even communication between any other perſon than the owner of the goods and the carrier: the carrier is bound to deliver the goods, and the perſon who actually delivers them acts as the ſervant of the carrier. This does not militate againſt the deciſion in the action alluded to againſt the innkeeper. In general it happens that the innkeeper in *London* has ſome intereſt or concern in the coaches and waggons that put up at his houſe. In thoſe caſes he is liable as a carrier: but even if this fact were not proved in that caſe, the porter was conſidered as the ſervant of the innkeeper; and if the latter inſiſted, by his ſervant, that he would not part with the game, until he had received more than he was entitled to, he was a wrong-doer, and liable to an action of *trover*. It has been ſaid too that that the place of a porter is valuable, and is the ſubject of a purchaſe: but who ſells the place? who agrees with him that he ſhall be the porter? not the perſon to whom the goods are ſent, but the carrier and the innkeeper, whom I conſider as the ſame perſon. But if the innkeeper have no ſhare in the profits of the carriage, and receives the goods for the purpoſe of delivering them to the owners, then the innkeeper is the ſervant of the carrier, as well as the porter. Therefore, whether there be the innkeeper and the porter, or the porter only, the carrier is liable in all caſes where the goods are loſt, after they get into the hands of the innkeeper or porter; becauſe they are delivered to thoſe perſons with the conſent, and as the ſervants of the carrier. It does not appear to me that the difficulties ſuggeſted reſpecting foreign ſhips exiſt. When goods are brought here from foreign countries, they are brought under a bill of lading, which is merely an undertaking to carry from port to port. A ſhip trading from one port to another has not the means of

carrying the goods on land; and, according to the eſtabliſhed courſe of trade, a delivery on the uſual wharf is ſuch a delivery as will diſcharge the carrier.

"In this caſe, however, I have not the leaſt doubt: the expreſſion in the card, circulated by the defendants, "carriers by land and navigation," cannot, indeed, have much weight, for reaſons given; but I rely on the charge which the defendants compelled the plaintiffs to pay before they would engage to deliver the goods. *Hibbert* was originally a ſervant to the defendants; and though he has ſince, by agreement with them, undertaken the cartage on his own account, and received the whole profits of it himſelf, that cannot affect third perſons. The different proprietors may divide the profits among themſelves, in any way they chuſe; but they cannot, by their own agreement with each other, exonerate themſelves from their liability to the owner of the goods. The carriers have the direction of the goods, and are reſponſible for them until they are delivered to the owner: and here the defendants inſiſted on receiving a certain ſum of money for the whole expence of carrying and delivering, including the identical charge of cartage, before they would take the goods into their veſſel. If the carrier and porter were to make ſeparate contracts with the owners of the goods, the latter would, at leaſt, have the option of ſending his own carts to bring away his goods: whereas here the defendants put the goods into the duke of *Bridgewater*'s warehouſe at once, in order to ſend them afterwards to the plaintiff's by a particular cart of their own. The defendants ſay, however, that they are warehouſemen as well as carriers. That they may fill thoſe two characters, at different times, I am ready to admit; but I deny that they can be both warehouſemen and carriers at the ſame inſtant. In this caſe they received the goods in the capacity of carriers; and as the engagement was to carry and deliver them, the goods remained in their cuſtody, as carriers, the whole time. The caſe of *Garſide* againſt theſe defendants * is perfectly diſtinguiſhable from the preſent: there the engagement, on the part of the defendants, was merely to carry the goods to *Mancheſter*; and, having diſcharged their duty in carrying them to that place, their liability ceaſed. It was proved in that caſe, that if the defendants had had the means of forwarding the goods from *Mancheſter* to *Stockport*, they were

* *Ante*, 293.

ready

ready to have delivered them to the *Stockport* carrier: but no ſuch carrier being then arrived, what were the defendants to do? They had carried the goods to the place of delivery according to their contract, and there being no one there ready to receive them; the next thing to be done was, to depoſit them in a place of ſafe cuſtody, and then their contract was at an end; but in this caſe the contract was not only to carry, but to deliver the goods at *Mancheſter*; and the plaintiffs had not the option of taking them from the quay before they were put into the warehouſe by the ſide of the canal; the preference given by the defendants to *Hibbert*, reſpecting the cartage is alſo a material circumſtance: it is like the caſe of an innkeeper, who agrees with his head hoſtler that the latter ſhall ſupply the cuſtomers with poſt horſes; in which caſe, if goods be loſt, the innkeeper is liable, becauſe he holds himſelf out to the public as the reſponſible perſon, and his engagement with the ſervant cannot vary the contract between him and the public; ſo in this caſe, *Hibbert* was the ſervant of the defendants, and the goods were ſtill in the cuſtody of the defendants as carriers at the time when the fire happened."

Groſe J. "The queſtion in this caſe is, whether the plaintiff's goods when they were conſumed by the fire, were or were not in the cuſtody of the defendants as common carriers? Undoubtedly they were ſo, unleſs the defendants had, according to their undertaking, delivered them to the plaintiffs. And then ariſes the material queſtion whether the delivery of the goods at the warehouſe at *Mancheſter* were a delivery to the plaintiffs; it ſeems to me that upon the circumſtances of this caſe it cannot be conſidered to be a delivery to them. Whether it be or be not a delivery, may depend on the general cuſtom of the trade, or the particular uſage which has prevailed between the parties themſelves; as to the general cuſtom, it is a ſtrong circumſtance againſt the defendants that the cotton merchants have never been accuſtomed to ſend their own carts for their goods, but thoſe goods have been ſent to the reſpective owners, either by carts belonging to, or procured by the defendants; and in the preſent caſe, the particular tranſaction is deciſive againſt the defendants; for the cartage was demanded of, and paid by the plaintiffs, before the goods were put on board the defendants' veſſel; and from that circumſtance the defendants undertook to deliver the goods at the place to which the carts were to carry them; they did not deliver them at that

place: the delivery at the warehouſe was not a delivery to the plaintiffs according to this contract. So much for the circumſtances of this caſe, which leave no room for doubt. On the general queſtion of law I am not ſo perfectly clear; and if it had been neceſſary to have decided this caſe on the general law, I ſhould have deſired further time to conſider of it. As far, however, as I have conſidered this caſe the ſtrong inclination of my opinion is that the defendants would be liable as common carriers. The law which makes carriers liable as inſurers, is indeed a hard law: but it is founded in wiſdom, and was eſtabliſhed to prevent fraud, but it ſeems to me that it would be of little importance to determine that carriers were liable as inſurers, unleſs they were alſo bound to ſee that the goods were carried home to their place of deſtination; ſince as many frauds may be practiſed in the delivery as in the carriage of them. In general the carrier appoints a porter who provides a cart for the purpoſe of delivering the goods: but it would be open to an infinity of frauds if the carrier could diſcharge himſelf of his reſponſibility by delivering them to a common porter, a perſon of no ſubſtance, a beggar of whoſe name the owner of the goods never heard, and againſt whom, in the event of the goods being loſt, there could be no ſubſtantial remedy. In this caſe the carriers fixed on the particular warehouſe at which the goods were depoſited on their arrival at *Mancheſter*, and made an agreement with their own ſervant *Hibbert* reſpecting the cartage; the defendants therefore ought to be anſwerable for the act of thoſe perſons whom they nominate. With reſpect to the caſe of *Garſide* againſt this company; there the goods were delivered, at leaſt as far as the defendants were bound to deliver them. The caſe of foreign goods brought to this country depends on the cuſtom of the trade, of which the perſons engaged in it are ſuppoſed to be cognizant: by the general cuſtom, the liability of ſhip carriers is at an end when the goods are landed at the uſual wharf. On the particular circumſtances of this caſe I am clearly of opinion that the verdict is right; and on the general queſtion of law, I do not mean to be bound by the opinion I have now given, though at preſent I think that common carriers are anſwerable if the goods be loſt at any time before they are delivered to the owners."

But for the more ſpeedy delivery of goods brought by common carriers to inns and warehouſes within the cities of *London* and *Weſtminſter*, the borough of *Southwark*, and the ſuburbs and liberties

liberties thereof reſpectively, and other parts contiguous thereto, not exceeding the diſtance of half a mile from the end of the carriage pavement in the ſeveral ſtreets and places within the ſaid cities, borough, and liberties; it is enacted by the *Stat.* 39 *Geo.* 3. *c.* 58. *ſ.* 4. *of the public local and perſonal Acts*,—"That every box, baſket, package, parcel, truſs, game, or other thing, brought to any inn, warehouſe, or other place, by any public ſtage coach or carriage, other than ſtage waggons for the purpoſe of delivery within the limits aforeſaid, (except where the ſame ſhall be directed to be left till called for,) ſhall be delivered according to the direction thereof within ſix hours after the arrival of any ſuch box, baſket, or other article, at ſuch inn, warehouſe, or other place, unleſs ſuch arrival ſhall be between the hours of four in the evening and ſeven in the morning, and in that caſe every ſuch delivery ſhall be made within ſix hours after ſuch hour in the morning, and in default thereof, every innkeeper, warehouſekeeper, or other perſon, to whoſe inn, warehouſe, or other place, ſuch box, baſket or other article ſhall be brought as aforeſaid, ſhall forfeit and pay, for every ſuch offence, any ſum not exceeding twenty ſhillings nor leſs than ten ſhillings.

By ſection 5, it is alſo declared that parcels brought by public ſtage waggons ſhall be delivered within 24 hours after their arrival at the inn.

By ſections 6, 7, 8, it is enacted, "That every ſuch box, baſket, package, parcel, truſs, game, or other thing, brought to ſuch inn, warehouſe or other place, as aforeſaid, which ſhall be directed to be left till called for, ſhall upon the demand of the perſon properly authorized to receive the ſame, be delivered to ſuch perſon without any charge or demand whatſoever, other than what is juſtly due for the carriage thereof, and the additional ſum of two pence for the warehouſe room thereof; and if the ſame be not delivered to ſuch perſon upon ſuch demand or any charge other than as aforeſaid be made or received in reſpect thereof, every innkeeper, warehouſekeeper, or other perſon, to whoſe inn, warehouſe, or other place, ſuch box, baſket, or other article, ſhall be brought as aforeſaid, ſhall forfeit and pay for every ſuch offence or overcharge, any ſum not exceeding twenty ſhillings nor leſs than ten ſhillings.

"Provided nevertheleſs, that if ſuch box, baſket, or other article, ſo directed to be left till called for, be not ſent for from ſuch inn, warehouſe, or other place before the end of one week after the

ſame

ſame is brought to ſuch inn, warehouſe, or other place, it ſhall be lawful to and for ſuch innkeeper, warehouſekeeper, or other perſon, to charge and receive the further ſum of one penny for the warehouſe room thereof, and ſo in like manner if the ſame be not ſent for before the end of the ſecond or any ſubſequent week, to charge the further ſum of one penny weekly."

" Provided alſo, that if any ſuch box, baſket, or other article brought to ſuch inn, warehouſe, or other place as aforeſaid, which is not directed to be left till called for, ſhall, before the ſame is ſent for delivery from ſuch inn, warehouſe, or other place, be demanded by any perſon properly authorized to receive the ſame, ſuch box, baſket, or other article ſhall be thereupon delivered to ſuch perſon ſo demanding the ſame; and it ſhall in ſuch caſe be lawful to and for ſuch innkeeper, warehouſe keeper, or other perſon to charge and take the ſum juſtly due for the carriage thereof, and alſo the ſum of two-pence for the warehouſe-room thereof; but if the ſame be not delivered to ſuch perſon upon ſuch demand, or any charge other than as aforeſaid be made or received in reſpect thereof, every innkeeper, warehouſe keeper, or other perſon, to whoſe inn, warehouſe, or other place, ſuch box, baſket or other article ſhall be brought as aforeſaid ſhall forfeit and pay for every ſuch offence any ſum not exceeding twenty ſhillings nor leſs than ten ſhillings."

And by ſection 1, it is enacted, that no perſon ſhall charge for the porterage or delivery of parcels within the limits aforeſaid, not exceeding fifty-ſix pounds weight, more than the rates or prices hereinafter mentioned, that is to ſay,

" For any diſtance not exceeding a quarter of a mile, three pence.

For any greater diſtance than a quarter of a mile, but not exceeding half a mile the ſum of four pence.

For any greater diſtance than half a mile, but not exceeding one mile, the ſum of ſixpence.

For any greater diſtance than one mile, but not exceeding one mile and a half, the ſum of eight pence.

For any greater diſtance than one mile an a half, but not exceeding two miles, the ſum of ten pence: and ſo in like manner the additional ſum of three pence for every further diſtance not exceeding half a mile."

6. By

6. *By and againſt whom the action ſhould be brought, and of the form of action againſt a carrier in caſe of loſs or damage of goods.*] All perſons carrying goods for hire, come under the denomination of common carriers: but if the driver of a ſtage coach, which only carries paſſengers for hire, loſe the goods of his paſſengers, the maſter is not liable; for no maſter is chargeable with the act of his ſervant, but when he acts in execution of the authority given him by his maſter; and then the act of the ſervant is the act of his maſter; and in ſuch caſe the action may be brought againſt either the maſter or the ſervant; and as the action may be brought either againſt the maſter or the ſervant, ſo either may bring *aſſumpſit* for the carriage. (*b*)

But if the action be brought by or againſt the proprietors, as it moſt commonly is, they being the moſt reſponſible perſons, all of them muſt be joined in the action. (*c*)

In actions againſt common carriers for the loſs or damage of goods entruſted to their care, it is frequently made a queſtion in whoſe name the action muſt be brought, whether in the name of the conſignor or conſignee? There are only three caſes reported on this point: but the reſult of them ſeems to be, that where the conſignor is to pay for the carriage of the goods, and cannot charge the conſignee upon the delivery to the carrier, the action ſhould be brought in his name; but where the conſignee orders the goods to be ſent by a particular carrier, to whom they are delivered, or is liable, in the ordinary courſe of trade, to pay for them upon the delivery to the carrier, the action muſt be brought in the name of the conſignee.

The firſt reported caſe is, *Davis* and *Jordan* v. *James*, (*d*) which was an action againſt a common carrier, for not delivering goods ſent by him: and the only queſtion was, "in whoſe name the action ought to have been brought?" The fact was, that *Davis* and *Jordan*, the preſent plaintiffs were manufacturers of cloth at *Shipton Mallet*, and their declaration charged, that being poſſeſſed of cloth as of their own proper goods, delivered the ſame to the defendant being the common carrier, &c., and requeſted him to deliver it ſafely and ſecurely for them, to one *Elizabeth Bowman*, at the *Three Nuns* at *White Chapel*; which they undertook to do, for a reaſonable price payable and paid by the ſaid plaintiffs to the de-

(*b*) *Salk.* 282. *Bul. N. P.* 70. (*c*) *Bul. N. P.* 70. (*d*) 5 *Bur.* 2680.

fendant,

fendant, but the goods were loſt and never delivered; the defendant pleaded not guilty, and the plaintiffs obtained a verdict.

The defendant's counſel moved for a new trial; objecting that the action ought to have been brought in the name of the conſignee of the goods and not in the name of the conſignors: for that the conſignors parted with their property, upon their delivering the goods to the carrier; and that no property remained in them after ſuch delivery. But the counſel for the defendant contended, that the carrier has nothing to do with the veſting of the property: it does not lie in his mouth to ſay, that the conſignor is not the owner; he is the owner with reſpect to the carrier, who has undertaken to him, and was paid by him; he was therefore ſervant to the conſignor; but had no connection at all with the conſignee, and many ſuch actions had been brought by the conſignor.

Lord *Mansfield*, Ch. J. ſaid: "There was neither law nor conſcience in the objection; the veſting of the property may differ according the circumſtances of caſes: but it does not enter into the preſent queſtion; this is an action upon the agreement between the plaintiffs and the carrier; the plaintiffs were to pay him; therefore the action is properly brought by the perſons who agreed with him, and were to pay him." The rule for a new trial was therefore diſcharged.

The next caſe is *Moore* and others v. *Wilſon*, (e) which was an action of *aſſumpſit*: and the declaration ſtated, that the defendant undertook to carry the goods for a certain hire and reward to be paid by the plaintiffs. It was proved, at the trial, that *Clarke*, the conſignee, had agreed with the plaintiffs to pay the carriage of the goods, which the defendant's counſel contended did not prove the declaration. And *Buller*, J., before whom the cauſe was tried, being of that opinion, nonſuited the the plaintiffs.

But a motion was afterwards made for a rule to ſhow cauſe why the nonſuit ſhould not be ſet aſide, on the ground that the allegation, that the hire was to be paid by the plaintiffs was immaterial; and that in all caſes of this kind the contract was virtually made between the carrier and the ſender of the goods; that no private agreement between the conſignor and the conſignee could vary

(e) 1 *Term Rep.* 659.

the

the queſtion as between the conſignor and the carrier; that though the conſignor might have parted with the property in the goods, he might maintain an action againſt the carrier. But at all events the conſignor might be conſidered as the agent of the conſignee for the purpoſe of bringing this action.

Buller, J. ſaid: "That on conſidering the queſtion he found he had been miſtaken in point of law; for that whatever might be the contract between the vendor and vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable." And the other two judges being of the ſame opinion, the rule was made abſolute without further argument.

The laſt reported caſe upon the queſtion is *Dawes* v. *Peck*, (*f*) which was alſo an action of *aſſumpſit*. The plaintiff proved his caſe by ſhowing the delivery of the goods to a perſon employed by the defendant at the uſual place, where they were booked to be ſent by the defendant's waggon, and the uſual price paid for booking by the plaintiff's ſervant. The caſks were "directed to Mr. *Odey*, *Hillmorton* near *Rugby*, *Warwick-*"*ſhire*, by *Peck*'s waggon." It appeared that they were afterwards ſent by the waggon and were left at the *Crown Inn* at *Weſt Haddon*, which was the neareſt place to *Hillmorton* in the road which the waggon travelled; and where, after laying ſome time, they were ſeized in conſequence of the time mentioned in the permit for their removal being expired. The merits of the caſe as between the plaintiff and *Odey*, the conſignee, or in reſpect of the legality of the ſeizure were not entered into: but the defendant's counſel, in opening his caſe to the jury read a letter from the plaintiff to *Odey*, after the ſeizure was known, in which he ſaid that the liquors ſent "were in quantity and prices exactly conformable to your (*Odey*'s) order: but by what authothority they were ever left at the *Crown Inn* at *Weſt Haddon* remains for the innkeeper, or the carrier to explain or account for. All I have to obſerve is this, that the goods *having been ſent conformable to your orders, and by the carrier you directed*, I ſhall certainly look to you for their amount," &c. Upon reading this letter, which was admitted to be genuine, Lord *Kenyon*, Ch. J. was of opinion, that the action by the preſent plaintiff could not be ſupported; for that the legal right to the goods

(*f*) 8 *Term Rep* 330. *See alſo* 1 *Atk.* 248. *S. P.*

after

after ſuch delivery was veſted in the conſignee, to whom alone the carrier was anſwerable, if at all; and therefore the plaintiff was nonſuited.

A new trial, however, was moved for; but after argument the Court determined that the action could only be brought by the conſignee, and they refuſed the rule.

Lord *Kenyon*, Ch. J. ſaid: "This queſtion muſt be governed by the conſideration, in whom the legal right was veſted; for he is the perſon who has ſuſtained the loſs, if any, by the negligence of the carrier; and whoever has ſuſtained the loſs is the proper party to call for compenſation from the perſon by whom he has been injured. The facts are theſe; a man in *Warwickſhire* gave an order for goods from *London*, which he directed to be ſent by a certain carrier, and the dealer, in *London*, delivered them accordingly to that carrier to be conveyed to the vendee; upon this ſhort ſtatement there can be no doubt but that after ſuch a delivery the vendee muſt ſtand to the riſk; then here the *damnum et injuria* are to him, and not to the vendor, the plaintiff. I do not find that any thing which I have advanced is broken in upon by the two caſes which have been relied upon in the argument: the diſtinction which is there taken I fully adopt; in the one caſe the action brought by the conſignor againſt the carrier was ſuſtained, becauſe the conſignor was to be anſwerable for the price of the carriage; he ſtood therefore in the character of an inſurer to the conſignee for the ſafe arrival of the goods, and the ſubſequent caſe of *Moore* v. *Wilſon* proceeded on the ſame ground. It is not diſputed, but that the conſignee might have maintained the action in this caſe: then if the conſignee had recovered a verdict againſt the carrier, how could ſuch recovery by a ſtranger have been pleaded in bar to this action? and if it could not, and yet this action could be maintained, the conſequence would be that the carrier would be liable to anſwer in damages to both for the ſame loſs. Therefore common ſenſe and juſtice, as well ſtrict law, are in favour of the objection made againſt the plaintiff's recovering in this action."

Lawrence, J. ſaid: "Some ſtreſs has been laid on the circumſtance of the conſignor having paid the carrier for booking the goods, as evidence of a ſpecial contract between them, in order to bring this caſe within thoſe which were cited at the bar: but that circumſtance would not give a right of action againſt the carrier to recover damage for the loſs of the goods, if it appeared that

that they were the property of another perſon. And here it is admitted that the action might have been brought by the conſignee in right of his property in them. It is true, that in ſome ſpecial caſes a man may make himſelf liable to either of two perſons on account of the ſame intereſt: but that is not uſual, and it is more conſonant to the general principle of law to refer all tranſactions of agents to the principal on whoſe account they were entered into. Now here I conſider that what was done by the conſignor, in reſpect of the booking, was as the agent of the conſignee, at whoſe riſk the goods were ſent; and, generally ſpeaking, the carrier knows nothing of the conſignor, but only of the perſon for whom the goods are directed, and to whom he looks for the price of the carriage upon delivery."

The ſame queſtion has, indeed, ariſen upon bills of lading; and in the caſe of *Evans* v. *Martlett*, (*g*) where it was ſaid, *per totam curiam*, "That if goods by bill of lading are conſigned to *A.*, *A.* is the owner, and muſt bring the action againſt the maſter of the ſhip if they are loſt. But if the bill be ſpecial, to be delivered to *A.* to the uſe of *B.*, *B.* ought to bring the action; but if the bill be general to *A.*, and the invoice only ſhows that they are upon the account of *B.*, *A.* ought always to bring the action, for the property is in him, and *B.* has only a truſt."

If goods be loſt or damaged, the carrier is liable to be ſued, either by ſpecial action on the caſe in *tort*, or *aſſumpſit*; but for a total loſs, the carrier is not liable to be charged in *trover*, unleſs there be a tortious converſion. (*h*) He is, however, ſubject to an action of *trover* where he delivers goods to a wrong perſon, though it happen by miſtake. (*i*)

7. *Of the Carrier's Lien on Goods.*] A carrier may retain the goods for his hire. As in the caſe of *Skinner* v. *Upſhaw*, (*k*) where the plaintiff brought an action of trover againſt the defendant, being a common carrier, for goods delivered to him to carry, &c. Upon not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him

(*g*) 1 *Ld. Raym.* 271. 3 *Salk.* 290. 12 *Mod.* 156.
(*h*) 1 *Ventr.* 223. 5 *Burr.* 2827. (*i*) Youl v. Harbottle, *Peake's Caſe*, N. P. 49. (*k*) 2 *Ld. Raym.* 752.

his

his hire; but that the plaintiff refuſed, &c., and therefore he retained them. And it was ruled, by *Holt*, Ch. J., that a carrier may retain the goods for his hire; and upon this direction, the defendant obtained a verdict.

So, by general uſage, a common carrier has a lien for his general balance. But ſuch uſage cannot be ſupported by a few recent inſtances of detention of goods by four or five carriers for their general balance; for ſuch a lien is not founded on any common law right, but only by contract, or general uſage: (*l*) Nor can the carrier's lien in any caſe affect the right of the conſignor to ſtop the goods in *tranſitu*. (*m*)

2. *Of Contracts of Bailment of Goods with Common Carriers by Water.*

1. *Of the General Liability of Maſter and Owner.*] Owners and maſters of *general* ſhips * and veſſels carrying goods for hire on the high ſeas, or in navigable rivers, are conſidered as common carriers, and anſwerable againſt all events, except the acts of *God*, and of the King's enemies, in the ſame manner as common carriers by land are reſponſible for the loſs or damage of goods entruſted to their care. (*n*)

Thus, in the caſe of *Mors* v. *Slue*, (*o*) which was an action againſt the defendant as maſter of a ſhip for the loſs of certain goods entruſted to his care for ſafe delivery; to which he pleaded, that in the night, whilſt the ſhip lay in the river *Thames*, eleven perſons came on board on pretence of preſſing of ſeamen for the King's ſervice, and by force ſeized and took the goods. And it was argued that there was not any negligence imputable

(*l*) *Vide* Aſpinall v. Pickford, 3 *Bos. & Pul.* 44. *n. a.* Ruſhforth v. Hadfield, 6 *Eaſt Rep.* 519. 7 *Eaſt Rep.* 224.

(*m*) Oppenheim v. Ruſſell, 3 *Bos. & Pul.* 42. Butler v. Woolcott, 2 *New Rep.* C. B. 64.

* *The term* "general ſhip" *is uſed in contradiſtinction to a* chartered ſhip, *which is employed under a ſealed inſtrument called a charter-party. See Abbott.* 101.

(*n*) Cogge v. Bernard, 2 *Ld. Raym.* 918. 1 *Ventr.* 238. *Jones's Laws of Bailments*, 106, 7. *Abbott.* 208.

(*o*) *T. Raym.* 220. 1 *Ventr.* 190. *S. C.* 238.

to the maſter. But the Court held, that he was nevertheleſs liable, and gave judgment againſt him accordingly.

So, in the caſe of *Dale* v. *Hall*, (*p*) which was an action upon the caſe againſt a ſhip maſter or keelman, who carried goods for hire from port to port; the plaintiff did not declare againſt him as a common carrier upon the cuſtoms of the realm, but the declaration was, that the defendant, at the ſpecial inſtance of the plaintiff, undertook to carry certain goods, conſiſting of knives, and other hardware, ſafe from ſuch a port to ſuch a port, and that in conſideration thereof the plaintiff undertook and promiſed to pay him ſo much money; that the goods were delivered to the defendant on board his keel, and that the goods were kept ſo negligently by him that they were ſpoiled, to the plaintiff's damage. That upon the general iſſue, *non aſſumpſit*, this cauſe came on to be tried before Juſtice *Burnett*, and the plaintiff proved, the goods were all in good order and clean when they were delivered on board, and that they were damaged by water and ruſted to the amount of 24*l*. This was all the plaintiff's evidence.

For the defendant it was inſiſted at the trial, that as the plaintiff had proved no particular negligence in the defendant; that he might be permitted to give in evidence that he had taken all poſſible care of the goods; that the rats made a leak in the keel or hoy, whereby the goods were ſpoiled by the water coming in; that they pumped and did all they could to prevent the goods being damaged, which evidence the Judge permitted to be given, and thereupon left it to the jury, who found a verdict for the defendant.

But the plaintiff's counſel afterwards moved for a new trial, contending that the evidence given for the defendant was not admiſſible or ſufficient to excuſe him: And in ſupport of their argument they cited the caſe of *Goff* v. *Clinkard*, (*q*) which was

(*p*) 1 *Wils.* 381. *See the caſe of* Lyon *and another* v. Mells, 5 *Eaſt Rep.* 428. *where it was determined, that a carrier by water for hire* impliedly *promiſes that the veſſel ſhall be tight and fit for the voyage, and is anſwerable for damage ariſing from* leakage, *though he had given notice,* "*that* "*he would not be anſwerable for* any *damage,* unleſs *occaſioned by want of* "*ordinary care in the maſter or crew of the veſſel.*"

(*q*) *At the Sittings at Guildhall, Hil. Term,* 23 Geo. 3. *coram* Lee, *Ch. J.* 1 *Wils.* 282. *in notis.*

an action againſt a maſter of a ſhip, who undertook to carry goods from *London* to *Amſterdam*; the breach aſſigned was, that a puncheon of rum was ſtaved and loſt to the plantiff's damage; this was proved to be done by the defendant's ſervants in letting it down into the hold of the ſhip, and though the defendant proved it was endeavoured to be let down into the hold with all poſſible care, yet by accident it was ſtaved; notwithſtanding this the jury gave a verdict for the plaintiff agreeable to the directions of the Chief Juſtice.

For the defendant it was inſiſted, that this declaration not being upon the cuſtom of the realm, but upon a particular contract, and that the breach aſſigned being, that by the negligence of the defendant the goods were ſpoiled, that therefore negligence is the very giſt of this action, and the defendant has proved there was no negligence; indeed if the declaration had been that the defendant promiſed to keep ſafely the goods as well as to carry them ſafely, he muſt have kept them ſafely at all events.

Lee, Ch. J. ſaid: "This is a nice diſtinction indeed. I am of opinion that the evidence given for the defendant was not admiſſible. The declaration is, that the defendant undertook for hire to carry and deliver the goods ſafe; and the breach aſſigned is, that they were damaged by negligence: this is no more than what the law ſays; every thing is a negligence in a carrier or hoyman that the law does not excuſe, and he is anſwerable for goods the inſtant he receives them into his cuſtody, and in all events, except they happen to be damaged by the act of *God*, or the King's enemies; and a promiſe to carry ſafely, is a promiſe to keep ſafely."

Denniſon, J. "The law is very clear in this caſe for the plaintiff; the declaration upon the cuſtom of the realm is the ſame in effect with the preſent declaration; in the old forms it is, that the defendant *ſuſcepit*, &c. which ſhows that it is *ex contractu*; in the preſent caſe the promiſe to carry ſafely need not be proved; the law raiſes it; the breach is very right that he did not deliver ſafely, but ſo negligently kept them that they were ſpoiled."

The two other judges were of the ſame opinion; and a new trial was accordingly granted.

So,

So, in the caſe of *Smith* v. *Shepherd*, (*r*) which was an action brought againſt the defendant as maſter of a veſſel navigating the river *Ouſe* and *Humber* from *Selby* to *Hull*, by the plaintiff whoſe goods had been wet and ſpoiled; at the trial whereof it appeared in evidence, that at the entrance of the harbour at *Hull* there was a bank, on which veſſels uſed to lie in ſafety, but of which a part had been ſwept away by a great flood ſome ſhort time before the misfortune in queſtion, ſo that it had become perfectly ſteep inſtead of ſhelving towards the river; that a few days after this flood a veſſel ſunk by getting on this bank, and her maſt, which was carried away, was ſuffered to float in the river tied to ſome part of the veſſel: and that the defendant upon ſailing into the harbour ſtruck againſt the maſt, which, not giving way, forced the defendant's veſſel towards the bank, where ſhe ſtruck, and would have remained ſafe had the bank been in its former ſituation, but on the tide ebbing her ſtern ſunk into the water, and the goods were ſpoiled: upon which the defendant tendered evidence to ſhow that there had been no actual negligence: Mr. Juſtice *Heath*, before whom the cauſe was tried, rejected the evidence; and he further ruled that the act of *God*, which could excuſe the defendant muſt be immediate; but that this was too remote; and directed the jury to find their verdict for the plaintiff; and they accordingly did ſo. The caſe was afterwards ſubmitted to the conſideration of the Court of *King's Bench*, who approved of the direction given by the learned Judge at the trial, and the plaintiff ſucceeded in the cauſe. There does not appear to have exiſted in this caſe any bill of lading, or other inſtrument of contract; and the queſtion therefore depended upon general principles, and not upon the meaning of any particular words or exception.

2. *Of a Delivery and Acceptance of Goods under a Bill of Lading in a general Ship.*] The contract for the conveyance of merchandize in a general ſhip is that by which the maſter and owners of a ſhip, deſtined on a particular voyage, engage ſeparately with various merchants unconnected with each other to convey their reſpective goods to the place of the ſhip's deſtination. (*s*) This contract, although uſually made perſonally with the maſter,

(*r*) *At the Lent Aſſizes for* Yorkſhire, 1795. *Abbott on Shipping*, 232.
(*s*) *Ibid.* 200.

and not with the owners, is conſidered in law to be made with them alſo, and that both he and they are ſeparately bound to the performance of it. (*t*)

When goods are ſent on board the ſhip, the maſter, or perſon on board acting for him, uſually gives a receipt for them, and the maſter afterwards ſigns and delivers to the merchant ſometimes two, and ſometimes three parts of a bill of lading, of which the merchant commonly ſends one or two to his agent, factor, or other perſon to whom the goods are to be delivered at the place of deſtination, that is, one on board the ſhip with the goods, another by the poſt or other conveyance; and one he retains for his own ſecurity. The maſter ſhould alſo take care to have another part for his own uſe. (*v*)

The terms of exception in the old form of a bill of lading were: "The dangers of the ſeas excepted." But theſe terms, it is ſaid, (*u*) were altered a few years ago in conſequence of an alarm taken by the ſhip-owners at the deciſion of the cauſe of *Smith* v. *Shepherd*, before mentioned; (*w*) and of late the exception is uſually made in the following words: ("*The act of* God, *the* "*King's enemies, fire, and all and every other dangers and accidents* "*of the ſeas, rivers and navigation, of whatever nature and kind* "*ſoever excepted.*") But in the caſe of ſhips homeward bound from the *Weſt India Iſlands*, which ſend their boats to fetch the cargo from the ſhore, there is introduced a ſaving out of this exception "*Of riſks of boats, ſo far as ſhips are liable thereto.*" And in that caſe the whole clauſe is as follows: "*The act of* God, "*the King's enemies, fire, and all and every other dangers and acci-* "*dents of the ſeas, rivers and navigation of whatever nature and* "*kind ſoever, ſave riſk of boats, ſo far as ſhips are liable thereto,* "*excepted.*"

In general the name of the conſignee is uſually mentioned in the bill of lading, but ſometimes the ſhipper or conſignor is himſelf named as conſignee, and the engagement is expreſsly to deliver to him or his aſſigns; and ſometimes no perſon is named as conſignee, but the terms of the inſtrument are, "*To be deli-* "*vered, &c. unto order, or aſſigns,*" which

(*t*) *Abbott on Shipping*, 102. 108. (*v*) *Ibid.* 201.
(*u*) *Ibid.* 203 & 232 *n. c.* (*w*) *Ante* 323.

words

words are generally underſtood to import an engagement on the part of the maſter to deliver the goods to the perſon to whom the ſhipper or conſignor ſhall order the delivery, or to the aſſignee of ſuch perſon. (*x*)

The ſeveral words lately introduced into the exception of the bill of lading have not hitherto furniſhed matter for any judicial determination. But upon the general exception of *perils of the ſea*, which is conceived to be a queſtion partly of fact, and partly of law, there have been ſome legal deciſions.

Thus in the caſe of *Pickering* v. *Barclay*, (*y*) where the ſhip had been overpowered and plundered on the high ſeas by pirates; and the queſtion was, whether the owners were anſwerable for the goods; the Court determined that they were not anſwerable, becauſe it is ſaid that the taking by pirates was accounted a peril of the ſea.

So, in the caſe of *Bever* v. *Tomlinſon*, (*z*) which came before the court of *King's Bench*, a ſhort time before the late alteration of the bill of lading, and which was an action brought to recover the value of goods, for which the maſter had ſigned a bill of lading containing an exception only of the perils of the ſea, although made during the time of a war, and which goods were loſt in conſequence of the ſhip being deſignedly ſtruck by the veſſel of an enemy; it was doubted by the Court, whether a loſs ſo occaſioned, were within the meaning of this exception; and it is ſaid that the cauſe never proceeded to a final judgment.

So, in the caſe of *Buller* v. *Fiſher*, (*a*) where it appeared that the ſhip in which the goods were conveyed, was run down in daylight, and not in a tempeſt, by one of two other ſhips, that were ſailing in an oppoſite direction to her, both of which kept to windward, as did alſo the defendant's ſhip; but it was matter of ſo much doubt whether the maſter of the defendant's ſhip, ought to have underſtood the courſe which the others would purſue, and have borne to leeward to avoid them, that no blame was conſidered to be imputable to him for not having done ſo, nor was any fault attributable to the perſons, who had the conduct of either of the other ſhips. This loſs was therefore held to fall within the meaning of this exception, and to have happened by a peril of the ſea.

(*x*) *Abbott* 203, 4. (*y*) 2 *Rol. Abr.* 248. *pl* 10. *Sty.* 132. *See alſo* Barton v. Wolliford, *Comb* 56. *S. P.* (*z*) *Eaſt Term* 36 *Geo.* 3. *Abbott* 237. (*a*) Sittings at Guildhall after Mich. Term, 40 *Geo.* 3. *Abbott*, 238, 236.

But in the caſe of robbery, (*b*) leakage, (*c*) fire, (*d*) or where the ſhip was accidentally driven againſt a bank at the entrance of a a harbour, (*e*) the courts, we have already ſeen, have determined that theſe accidents do not fall within the terms of the general exception. So, it is ſaid, (*f*) that not every loſs proceeding directly from natural cauſes, is to be conſidered as happening by a peril of the ſea. If a ſhip periſh in conſequence of ſtriking againſt a rock or ſhallow, the circumſtances, under which the event takes place, muſt be aſcertained in order to decide, whether it happen by a peril of the ſea or by the fault of the maſter; if the ſituation of the rock or ſhallow is generally known, and the ſhip not forced upon it by adverſe winds or tempeſt, the loſs is to be imputed to the fault of the maſter. On the other hand, if a ſhip is forced upon ſuch a rock or ſhallow by adverſe winds or tempeſt, or if the ſhallow was occaſioned by a ſudden and recent collection of ſand in a place, where ſhips could before ſail in ſafety; the loſs is to be attributed to the act of God or the perils of the ſea.

In the caſe of *Edwards* and *others* v. *Sherratt*, (*g*) where the defendant a common carrier from *Birmingham* through *Wolverhampton* to *Radford*, employed diſtinct boats to carry to and from *Birmingham* to *Wolverhampton* which paſſed on different days. The plaintiff knowing this, and having corn at *Wolverhampton* which was threatened to be ſeized by a mob, wrote to the defendant at *Birmingham* to ſend a private boat quickly on account of the ſtate of the country, to take the corn to *Birmingham*, to which the defendant not returning any anſwer, and plaintiff fearing to wait till the day the defendant's boat would, in the uſual courſe of employment, go from *Wolverhampton* to *Birmingham*, ſtopped the boat paſſing by from *Radford* to *Birmingham*, and without diſcloſing the circumſtances to the boatman, prevailed on him to take the corn on board, and then diſpatched him forward in the night, having privately ſent orders to open the lock at any time when he ſhould paſs. After a verdict for the defendant, negativing that the corn was delivered in the uſual courſe of dealing as a common common carrier, the Court held that the verdict might be ſuſtained, either on the general ground of fraud in the plaintiff, or on the circumſtances of the caſe, furniſhing altogether evidence of a tacit ſtipulation on the part of the defendant to do the beſt he could,

(*b*) *Ante*, 320. (*c*) *Ante*, 321. (*d*) *Ante*, 292, &c.
(*e*) *Ante*, 323. (*f*) *Abbott*, 239. (*g*) 1 *Eaſt Rep.* 604.

but

but not to be anſwerable as a common carrier for the violence of the mob; or becauſe it did not appear that the boatman, whoſe ordinary employment was between *Radford* and *Birmingham* had authority from the defendant to accept the goods at *Wolverhampton* for *Birmingham*, much leſs to accept them in that manner.

Upon a declaration againſt a lighterman in the common form for negligence, the plaintiff cannot recover if it appear that the loſs was not occaſioned by a neglect of the common and ordinary duty of the defendant.

Thus, in the caſe of *Whalley* v. *Wray*, (*b*) which was an action of *aſſumpſit* againſt the defendant, as a lighterman, for damage done to the plaintiff's goods, which had been entruſted to him to depoſit in the plaintiff's warehouſe.

The declaration was in the common form: viz. that the defendant being a lighterman, &c. had undertaken to carry the plaintiff's goods, and to deliver them ſafely; and then averred a loſs by negligeuce.

The facts of the caſe were, that a quantity of rice had been delivered on board the defendant's lighter, to be landed at the plaintiff's warehouſe; previous however, to rice being to be landed it is neceſſary to preſent a petition to the commiſſioners of the cuſtoms, who refer it to the land ſurveyor, upon whoſe report it is permitted to be landed.

In this caſe, a petition had been preſented to the commiſſioners of the cuſtoms, by Mr. *Stevenſon* who was the cuſtom-houſe agent to the plaintiff: but no report having been made on it, the land-ſurveyor refuſed to permit the rice to be landed; in conſequence of which, it remained in the lighter undiſcharged, where it received the damage for which the preſent action was brought. It alſo appeared in evidence, that the preſenting the petition, &c. was uſually done by the cuſtom-houſe agent of the party to whom the rice belonged, and that it was not uſually done by the lighterman.

(*b*) 3 *Eſp. Rep.* 74.

Lord *Eldon*, Ch. J. ſaid: "In this caſe, the plaintiff has declared generally in *aſſumpſit*. To entitle the plaintiff to recover, it muſt appear that the loſs happened by the neglect of doing that which was the regular and common duty of the defendant. The law raiſes no preſumption of what is his duty: that is matter of evidence: here it is in evidence that the preſenting the petition, and the ſubſequent proceedings, was the buſineſs of the cuſtom-houſe-agent of the plaintiff, not of the lighterman: if there had been any contract, or undertaking on the part of the lighterman, by the neglect of which the goods were ſpoiled, it ſhould have been the object of a ſpecial count: there is no ſuch count, and the plaintiff has relied on the general liability of the defendant, without making it out in evidence, that it was the duty of the defendant to have done that, from the neglect of which the loſs has ariſen." The plaintiff was therefore nonſuited.

3. *Of a Special or Conditional Acceptance of Goods without a Bill of Lading.*] If a common carrier from *A.* to *C.* receives goods for delivery at *B.* an intermediate place; at which he ſafely arrives, and has an opportunity of delivering the goods, but omits ſo to do; and the veſſel and goods in their paſſage to *C.* are unavoidably loſt, he is anſwerable for the value of the goods, though he accepts them under a particular notice, which limits his reſponſibility to the want of ordinary care.

Thus, in the caſe of *Ellis* v. *Turner* and another, (*i*) which was an action brought againſt the owner for the value of goods damaged by the ſinking of their veſſel; the circumſtances were as follow. The veſſel was employed in carrying goods from *Hull* to *Stockwith*, and to *Gainſborough*, which is a little further than *Stockwith*, but the freight was the ſame for conveyance to either place. On former voyages the goods deſtined to *Stockwith* had ſometimes been delivered there on the way to *Gainſborough*, and at other times carried forward to *Gainſborough*, and delivered at *Stockwith*, on the return to *Hull*. The goods in queſtion were delivered to the maſter on his expreſs undertaking to deliver them at *Stockwith* on his way to *Gainſborough*; this particular undertaking was made by the maſter without the privity of the defendants, but

(*i*) 8 *Term Rep.* 531.

be

he had a general authority from them to receive and convey goods for the cuſtomary freight from *Hull* to *Stockwith* and *Gainſborough*. The defendants had previouſly given public notice, which the plaintiff's agent, who ſhipped the goods, was acquainted, "that "they would not be anſwerable for any loſs or damage that "might happen to any cargo, unleſs occaſioned by the want of "ordinary care and diligence in the maſter and crew, in which "caſe they would pay ten per cent. upon the loſs, provided ſuch "payment did not exceed the value of the veſſel, but that they "were willing to enſure againſt all accidents, upon receiving ex-"tra-freight in proportion to the value." No agreement had been made for the payment of extra-freight for the goods in queſtion: the veſſel took in other goods there, to be delivered at *Stockwith* in the preſent voyage, and arrived ſafely at that place. The maſter delivered ſome of the other goods there and was requeſted by the wharfinger to deliver all that were deſtined for that place, but without the knowledge of the defendants refuſed to deliver the others, alledging that they were ſtowed below the goods deſtined to *Gainſborough*. On the way from *Stockwith* to *Gainſborough*, the veſſel ſunk, without any want of ordinary care in the maſter or crew, and the goods in queſtion were damaged. The Court of *King's Bench* determined that the plaintiff was entitled to recover the amount of his loſs. Lord *Kenyon*, Ch. J. ſaid, "As the veſſel reached *Stockwith* in ſafety, and might have delivered the goods there, I think this action may be maintained; for though the loſs happened in conſequence of the miſconduct of the defendant's ſervant, the ſuperiors (the defendants) are anſwerable for it in this action. The defendants are reſponſible for the acts of their ſervant in thoſe things that reſpect his duty under them, though they are not anſwerable for his miſconduct in thoſe things that do not reſpect his duty to them, as if he were to commit an aſſault upon a third perſon in the courſe of his voyage."

4. *When the Reſponſibility of the Maſter and Owner begins and determines; and in what Caſes they are Wholly or in Part exempt from making good a Loſs or Damage, &c.*] As ſoon as the maſter accepts the goods on board his ſhip, his and the owner's reſponſibility commence. But the manner of delivering the goods, and conſequently the period at which the reſponſibility of the maſter and

and owners will ceaſe, will depend upon the cuſtom of particular places, and the uſage of particular trades. (*k*) Thus a hoyman, who brings goods from an out-port to the port of *London*, is not diſcharged by landing them at the uſual wharf, but is bound to take care and ſend them out by land to the place of conſignment. And if the conſignee require to have the goods delivered to himſelf, and direct the maſter not to land them on a wharf at *London*, the maſter muſt obey the requeſt; for the wharfinger has no legal right to inſiſt upon the goods being landed at his wharf, although the veſſel be moored againſt it. But in the caſe of ſhips coming from a foreign country, delivery at a wharf in *London* diſcharges the maſter; if the conſignee ſend a lighter to fetch the goods, the maſter of the ſhip is obliged by the cuſtom of the *River Thames* to watch them in the lighter, until the lighter is fully laden, and until the regular time of its departure from the ſhip is arrived; and he cannot diſcharge himſelf from this obligation by declaring to the lighterman that he has not hands to guard the lighter, unleſs the conſignee conſent to releaſe him from the performance of it. In the caſe of ſhips coming from *Turkey*, and obliged to perform quarantine before their entry into the port of *London*, it is uſual for the conſignee to ſend down perſons at his own expence, to pack and take care of the goods; and therefore where a conſignee had omitted to do ſo, and goods were damaged by being ſent looſe to ſhore; it was held, that he had no right to call upon the maſter of the ſhip for a compenſation. (*l*)

A common carrier is not reſponſible where the ſervant of the conſignee or owner is ſent with the goods for the purpoſe of protecting them.

Thus, in the caſe of the *Eaſt India* Company *v* *Pullen*, (*m*) which was an action againſt the defendant as a common carrier, on an undertaking to carry for hire on the river *Thames* from the ſhip to the company's warehouſes. Upon the evidence it appeared, the defendant was a *common lighterman*, and that it was the uſage of the company on the unſhipping of their goods to clap an officer, who is called a guardian, in the lighter, who, as ſoon as the lading is taken in, puts the company's lock on the hatches, and

(*k*) *Abbott*, 229. (*l*) *Ibid.* 230. (*m*) 2 *Stra.* 690. But ſee the caſe of Robinſon *v.* Dunmore, poſt, 336.

goes

goes with the goods to ſee them ſafe delivered at the warehouſe. It appeared to be done ſo in this caſe, and part of the goods were loſt.

Raymond, Ch. J. was of opinion "That this differed from the common caſe, this not being any truſt in the defendant, and the goods were not to be conſidered as ever having been in his poſſeſſion, but in the poſſeſſion of the company's ſervant, who had hired the lighter." He thought therefore the action was not maintainable, ſo the plaintiffs were nonſuited.

In the caſe of fire, the owners are wholly exempt by ſtatute from making good any loſs or damage happening to goods by reaſon thereof; and in other caſes of loſs the legiſlature have limited their reſponſibility.

Thus, by the Stat. 26 *Geo.* 3. *c.* 86. *ſ.* 2. it is enacted, "That no owner or owners of any ſhip or veſſel ſhall be ſubject or liable to anſwer for, or make good, to any one or more perſon or perſons, any loſs or damage, which may happen to any goods or merchandize whatſoever, which from and after the firſt day of September, 1786, ſhall be ſhipped, taken in, or put on board any ſuch ſhip or veſſel, by reaſon or means of any fire happening to or on board the ſaid ſhip or veſſel."

In this clauſe the maſter is not mentioned; and therefore it is obſerved (*n*) that it may be doubtful whether his reſponſibility is in this caſe removed by the ſtatute: but the inſertion of the word fire in the modern bill of lading has certainly removed it.

By the third ſection of the ſame ſtatute reciting, "That diſputes may ariſe, whether the owners or maſters of ſhips are liable to anſwer or make good the value or amount of any gold, ſilver, diamonds, watches, jewels, or precious ſtones, which may be loſt after the ſame may have been but on board their ſhips on freight, without the ſhippers thereof declaring at the time the value of ſuch goods," It is enacted, "That no maſter, owner, or owners of any ſhip or veſſel ſhall be ſubject or liable to anſwer for or make good, to any one or more perſon or perſons, any loſs or damage, which may happen to any gold, ſilver, diamonds, watches, jewels, or precious

(*n*) *Abbott*, 241.

ſtones,

ſtones, which, from and after the paſſing of this act, ſhall be ſhipped, taken in, or put on board any ſuch ſhip or veſſel, by reaſon or means of any robbery, embezzlement, making away with, or ſecreting thereof, unleſs the owner or ſhipper thereof ſhall, at the time of ſhipping the ſame, inſert in his bill of lading, or otherwiſe declare, in writing, to the maſter, owner or owners of ſuch ſhip or veſſel, the true nature, quality, and value of ſuch gold, ſilver, diamonds, watches, jewels, or precious ſtones."

By the ſtat. 7 *Geo.* 2. *c.* 15. reciting, "Whereas it is of the greateſt conſequence and importance to this kingdom to promote the increaſe of the number of ſhips and veſſels, and to prevent any diſcouragement to merchants and others from being intereſted and concerned therein: and whereas it has been held, that in many caſes owners of ſhips or veſſels are anſwerable for goods and merchandize ſhipped or put on board the ſame, although the ſaid goods and merchandize, after the ſame have been ſo put on board, ſhould be made away with by the maſters or mariners of the ſaid ſhips or veſſels, without the knowledge or privity of the owner or owners; by means whereof merchants and others are greatly diſcouraged from adventuring their fortunes, as owners of ſhips or veſſels, which will neceſſarily tend to the prejudice of the trade and navigation of this kingdom. Therefore, for aſcertaining and ſettling how far owners of ſhips and veſſels ſhall be anſwerable for any gold, ſilver, diamonds, jewels, precious ſtones, or other goods or merchandizes, which ſhall be made away with by the maſters or mariners, without the privity of the owners thereof," It is enacted, "That no perſon or perſons who is, are, or ſhall be owner or owners of any ſhips or veſſels ſhall be ſubject or liable to anſwer for, or make good to any one or more perſon or perſons, any loſs or damage by reaſon of any embezzlement, ſecreting, or making away with by the maſter or mariners, or any of them, of any gold, ſilver, diamonds, jewels, precious ſtones, or other goods or merchandize, which ſhall be ſhipped, taken in, or put on board any ſhip or veſſel, or for any act, matter, or thing, damage or forfeiture, done, occaſioned, or incurred by the ſaid maſter or mariners, or any of them, without the privity and knowledge of ſuch owner or owners, further than the value of the ſhip or veſſel, with all her appurtenances, and the full amount of the freight due, or to grow due, for and during the voyage wherein ſuch embezzlement,

bezzlement, ſecreting, or making away with as aforeſaid, or other malverſation of the maſter or mariners, ſhall be made, committed, or done; any law, uſage or cuſtom to the contrary thereof in anywiſe notwithſtanding."

And by the ſecond ſection of the ſame ſtatute it is enacted, "That if ſeveral freighters or proprietors ſuſtain loſſes, exceeding in the whole the value of the ſhip and freight, they are to receive compenſation thereout in proportion to their reſpective loſſes: and any one freighter, on behalf of himſelf and the other freighters, or any part-owner, on behalf of himſelf and the other part-owners, may file a bill in a Court of Equity for the diſcovery of the total amount of the loſſes, and of the value of the ſhip, and for an equal diſtribution and payment."

But by the third ſection, if ſuch a bill is filed by or on behalf of the part-owners, the plaintiff muſt make affidavit that he does not collude with the defendants, and muſt offer to pay the value of the ſhip and freight, as the Court ſhall direct.

And by the fourth ſection it is provided, declared, and enacted, "That nothing in this preſent act contained ſhall extend, or be conſtrued to extend to impeach, leſſen, or diſcharge any remedy which any perſon or perſons now hath, or ſhall, or may hereafter have againſt all, every or any the maſter and mariners of ſuch ſhip or veſſel, for or in reſpect of any embezzlement, ſecreting, or making away with any gold, ſilver, diamonds, jewels, precious ſtones, or merchandize, ſhipped or loaded on board ſuch ſhip or veſſel, or on account of any fraud, abuſe, or malverſation of and in ſuch maſter or mariners reſpectively; but that it ſhall and may be lawful to and for every perſon or perſons ſo injured or damaged, to purſue and take ſuch remedy for the ſame, againſt the ſaid maſter and mariners reſpectively, as he or they might have done before the making of this act."

By this ſtatute the legal reſponſibility of the maſter is left unaltered in all the caſes before enumerated, and that of the owners alſo, in the caſe of a robbery committed by perſons not belonging to the ſhip. But where a ſhip in the river *Thames* was forcibly plundered of dollars, during the night, by a gang of robbers, in conſequence of information given by one of the mariners of the ſhip, who afterwards ſhared the booty, the reſponſibility of the owners

owners was held not to extend beyond the value of the ſhip and freight, by virtue of this ſtatute. (*o*)

It is therefore obſerved, (*p*) that immediately after the deciſion of this caſe, and in conſequence of the danger to which the facts that were diſcloſed in it ſhowed the owners to be expoſed, a petition was preſented to the *Houſe of Commons*, on behalf of ſeveral owners of ſhips belonging to *London* and other parts; and, in compliance therewith, another ſtatute (*q*) was paſſed, fixing the ſame limits to the reſponſibility of the owners, in the ſeveral caſes mentioned in the preceding ſtatute, and alſo in the caſe of robbery, "although the maſter or mariners ſhall not be "in anywiſe concerned in or privy to ſuch robbery, embezzle-"ment, ſecreting, or making away with." This ſtatute alſo contains the ſame proviſions as the preceding act, for equal diſtribution and diſcovery, by bill in equity, and alſo for remedy againſt the maſter and mariners.

Mr. *Abbott* alſo obſerves, (*r*) that in thoſe parts of each of theſe ſtatutes which treat of the damage and reſponſibility, the words "*owner or owners of any ſhip or veſſel*," are uſed, and not the word *part-owners*, although the part-owner by name is enabled to file a bill in equity on behalf of himſelf and all the other part-owners. And therefore it may be queſtioned whether, if any one part-owner ſhould be privy to an act of mal-practice, and ſo clearly be excluded from the benefits of the ſtatutes, the other part-owners would be excluded alſo. But as the maſter is very often a part owner, and the firſt ſtatute was evidently framed to eaſe the owners from a part of their reſponſibility for his miſconduct, it ſhould ſeem that by his privity they would not loſe the benefit of that ſtatute; and as both ſtatutes are made *in pari materia*, and expreſſed in the ſame terms, probably by the true conſtruction of both, one part-owner cannot prejudice the others by his own individual miſconduct.

(*o*) *Vide Abbott*, 248. (*p*) *Ibid.*
(*q*) 26 *Geo.* 3. *c.* 86. *ſ.* 1. *Ante*, 331. (*r*) *Page* 249.

3. *Of*

3. *Of Contracts of Bailment of Goods with Private Carriers, either with or without Reward.*

If a man undertakes to carry goods *ſafely* and *ſecurely*, he is reſponſible for any damage they may ſuſtain in the carriage through his neglect, though he be not a common carrier, and is to have nothing for the carriage of them.

Thus, in the caſe of *Coggs* v. *Bernard*, (*s*) in which the plaintiff declared, "that whereas the defendant undertook ſafely and ſecurely to take up ſeveral hogſheads of brandy, then in a certain cellar in *D.* and ſafely and ſecurely to lay them down again in a certain other cellar in *Water-lane*, the ſaid defendant and his ſervants and agents, *tam negligenter et improvidè*, put them down again into the ſaid other cellar, *quod per defectum curæ ipſius* the defendant, his ſervants and agents, one of the caſks was ſtaved, and a great quantity of brandy, viz. ſo many gallons of brandy, were ſpilt. After not guilty pleaded, and a verdict for the plaintiff, a motion was made in arreſt of judgment, becauſe that it was not alledged in the declaration that the defendant was a common porter, or averred that he had any thing for his pains.

But the Court, after great conſideration, were of opinion, that the declaration was good, and gave judgment for the plaintiff. *Gould*, Juſt. ſaid, "That the declaration was good whether a conſideration be laid or not; and that any man that undertakes to carry goods is liable to an action, be he a common carrier, or whatever he is, if, through his neglect, they are loſt, or come to any damage: and if a premium be laid to be given, then it is without queſtion ſo. The reaſon of the action is, the particular truſt repoſed in the defendant, to which he has concurred by his aſſumption, and in the executing which he has miſcarried by his neglect. But if a man undertakes to build a houſe, without any thing to be had for his pains, an action will not lie for non-performance, becauſe it is *nudum pactum*. So is the 3 *H.* 6. 36. So if goods are depoſited with a friend, and are ſtolen from him, no action will lie. 29. *Aſſ.* 28. But there will be a difference in that caſe upon the evidence how the matter appears: if they were ſtolen by reaſon of a groſs neglect in the bailee, the truſt will not

(*s*) 2 *Lord Raym* 909 *Com. Rep.* 133. *S. C.*

ſavehim from an action; otherwiſe, if there be no groſs neglect. So, is *Doct.* and *Stud.* 129. upon that difference. The ſame difference is, where he comes to goods by finding. *Doct.* and *Stud. ubi ſupra. Owen*, 141. But if a man takes upon him expreſsly to do ſuch an act ſafely and ſecurely, if the thing comes to any damage by his miſcarriage, an action will lie againſt him. If it be only a general bailment, the bailee will not be chargeable without a groſs neglect."

Holt, Ch. J. ſaid, "If it had appeared that the miſchief happened by any perſon that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the ſtreets, and had pierced the caſk of brandy; in this caſe the defendant had not been anſwerable for it, becauſe he was to have nothing for his pains."

So, if *A.* ſends goods by *B.* who ſays, "I will warrant they ſhall go ſafe," *B.* is liable for any damage ſuſtained by the goods, notwithſtanding *A.* ſend one of his own ſervants in *B.*'s cart to look after them.

Thus, in the caſe of *Robinſon* v. *Dunmore*, (*t*) which was an action of *aſſumpſit*. The declaration ſtated, that in conſideration that the plaintiff, at the ſpecial inſtance and requeſt of the defendant, would deliver to the defendant divers goods and chattels, (ſpecifying them,) to be taken care of, and ſafely and ſecurely carried and conveyed by the defendant, in and by a certain cart of defendant, from *A.* to *B.*, and there, to wit, at *B.* to be ſafely and ſecurely delivered to one *J. S.* for certain hire and reward to the defendant in that behalf, the defendant undertook and promiſed to take care of the ſaid goods and chattels, and ſafely and ſecurely to carry and convey the ſame, in and by his ſaid cart, from *A.* to *B.*, and there, to wit at *B.* ſafely and ſecurely to deliver the ſame to the ſaid *J. S.*; that the plaintiff did afterwards deliver the ſaid goods and chattels to the defendant, to be carried, conveyed, and delivered as aforeſaid; and that, although the defendant had and received the ſaid goods and chattels for the purpoſe aforeſaid, yet he did not take care of the ſaid goods and chattels, or ſafely and ſecurely carry or convey the ſame, in and by his ſaid cart or otherwiſe, from *A.* to *B.*, nor there, to wit, at *B.*, ſafely and ſecurely deliver the ſame to the ſaid *J. S.*; but, on

(*t*) 2 *Bos. & Pul.* 416.

the

the contrary, ſo careleſsly conducted himſelf in and about the carriage and conveyance of the ſaid goods and chattels, that a great part of them, to wit, &c. through his negligence, were wetted and damaged.

The defendant pleaded *non aſſumpſit*; and upon the trial it appeared in evidence, that the plaintiff, who was an upholſterer, having occaſion to ſend ſome furniture into the country, agreed with one *Groves*, a carman, to take the ſame for ten guineas, excluſive of tolls; that *Groves*, thinking the diſtance too great, offered the defendant, who alſo kept a horſe and cart, the refuſal of the job, who agreed to undertake it, and gave *Groves* half a guinea by way of gratuity; that the plaintiff having acceded to the defendant's offer to go inſtead of *Groves*, the defendant brought his cart to the plaintiff's houſe, where the goods were loaded, in the preſence of the plaintiff himſelf, and with the aſſiſtance of two of the plaintiff's men; that the plaintiff having obſerved that the tarpaulin which the defendant had brought for the purpoſe of covering the cart was too ſmall, the defendant ſaid, "*I have plenty of ſacks, and I will warrant the goods ſhall go ſafe.*" On account of the defendant being a ſtranger to the plaintiff, the latter ſent one of his own porters with the cart, who would otherwiſe have gone by the ſtage; that this porter, in the courſe of the journey, paid a perſon for watching the goods one night; and that the goods, in the courſe of the journey, were damaged by rain. A verdict was found for the plaintiff, with liberty for the defendant to move that the verdict might be ſet aſide, and a nonſuit entered.

Accordingly a motion was made to that effect; and the counſel for the defendant contended that the defendant never had ſuch poſſeſſion of the plaintiff's goods as to render him liable in the character of a common carrier; that in this caſe there was no bailment; it was a mere contract between the plaintiff and defendant, that the former ſhould hire, and the latter ſhould let a cart and horſe, for the conveyance of the plaintiff's goods. But the Court, without hearing counſel on the other ſide, determined that the plaintiff was entitled to recover, and gave judgment accordingly.

Chambre, J. ſaid, "This is a very clear caſe. The defendant is not a common carrier by trade, but has put himſelf into the ſituation of a common carrier by his particular warranty. As to poſſeſſion, that ſeems clearly proved by the circumſtances of the

caſe. The defendant attends with his horſe and cart at the plaintiff's houſe, where the goods are delivered to him, and put into the cart by the plaintiff's ſervants. This is a complete poſſeſſion. How is this affected by the preſence of the plaintiff's ſervant? It has been determined, that if a man travel in a ſtage-coach, and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not abſolved from his reſponſibility, but will be liable, if the portmanteau be loſt. In this caſe the plaintiff, for greater caution, ſends his ſervant with the goods, who pays for watching them, becauſe he apprehends danger of their being ſtolen. So the man who travels in a ſtage has ſome care of his own property, ſince it is more for his intereſt that the property ſhould not be loſt, than that he ſhould have an action againſt the carrier. This caſe bears no reſemblance to that cited from *Strange*; (*t*) for there the deciſion proceeded on the uſage of the *Eaſt India* Company, who never entruſt the lightermen with their goods, but give the whole charge of the property to one of their own officers, who is called a guardian. The evidence of the warranty is perfectly clear; for on the plaintiff's making ſome objection to the ſmallneſs of the tarpaulin, the defendant, in order to remove that difficulty, informed him that he had plenty of ſacks to cover the goods, and undertook that they ſhould be carried ſafe. It appears to me that the verdict is perfectly right, and that the jury could not have done otherwiſe than they have done."

5. *Of Contracts of Bailment of Goods, &c. to be kept, either with or without a Reward.*

1. *Of Bailment of Goods with Private Perſons.*]—Where goods are bailed to be kept for hire, the bailee is only bound to take the ſame care of them as he would of his own; and therefore if they be ſtolen by the bailee's ſervants, without groſs negligence on his part, the bailee is not reſponſible.

Thus, in the caſe of *Finucane* v. *Small*, (*u*) which was a ſpecial action on the caſe, the declaration ſtated, "That the plaintiff had delivered to the defendant a certain trunk, containing ſeveral

(*t*) *Ante* 330. (*u*) 1 *Eſp. Rep.* 315. *See alſo Jones's Law of Bailments*, 49.

articles,

articles, to be by him kept for a certain reward, to be paid to him by the plaintiff for the ſame; and that the defendant ſo negligently kept the trunk, that ſeveral of the articles which were contained in it were ſtolen and loſt."

The facts proved were, that *Small*, the defendant, was an upholſterer: the plaintiff was an officer in the army, and being about to leave *London*, he ſent his trunk to the defendant's houſe, for ſafe cuſtody; and he was to pay him 1*s.* per week for the houſe-room. When the plaintiff returned, he received the trunk; but the whole of the contents had been taken out. Upon the opening of the caſe by the plaintiff's counſel, Lord *Kenyon*, Ch. J. ſaid, he thought the declaration could not be ſupported; that it was an action againſt the defendant, charging him as a bailee. He could not be charged in that capacity, when it appeared that he had taken as much care of the goods ſo delivered to him as he had of his own; and the goods being ſtated in the declaration to have been ſtolen, that that did not ſeem to amount to a negligence ſufficient to charge him with the loſs.

It was anſwered by the plaintiff's counſel, that it was true a bailee could only be charged for negligence; but if a bailee took ſuch little care of goods, or expoſed them to the danger of being loſt or embezzled from want of due care, and they were in conſequence of that ſtolen, that was a ſpecies of negligence ſufficient to charge him with the loſs; and they aſſerted that they could give evidence of ſuch negligence.

To eſtabliſh this fact, they endeavoured to prove, that, at different times, ſeveral articles of value had been ſtolen from the defendant's houſe, and that he had often complained of the diſhoneſty of his ſervants; upon which the counſel contended that this was ſufficient proof of groſs negligence.

But Lord *Kenyon* ſaid, "To ſupport an action of this nature, poſitive negligence muſt be proved. It has appeared, in evidence in this caſe, that the goods were lodged in a place of ſecurity, and where things of much greater value were kept. This is all that is incumbent on the defendant to do; and if ſuch goods are ſtolen by the defendant's own ſervants, that is not a ſpecies of negligence of a deſcription ſufficient to ſupport this action, inaſmuch as he has taken as much care of them as of his own." The plaintiff was therefore nonſuited.

So a bailee, with whom goods are depoſited to be kept generally *without reward* for the uſe of the bailor, is not anſwerable for their loſs, or for any damage they may ſuſtain, unleſs he is guilty of ſome groſs neglect with reſpect to them: Nor even then if he is guilty of the ſame neglect with reſpect to his own. (*u*)

In the caſe of *Mytton* v. *Cock*, (*w*) where the plaintiff who was owner of a *Carton*, left it in the hands of the defendant, who was an auctioneer, without any particular agreement to take care of it, or re-deliver it ſafe, and without any agreement for a reward. And in a ſpecial action upon the caſe for not re-delivering it ſafe, but ſuffering it to be ſpoiled, it appeared upon the evidence, that the painting was upon paper, paſted on canvas, and that it was kept by the defendant in a room next to a ſtable, in which there was a wall that had made it damp and peel. And upon this evidence it was left to the jury, whether this was a groſs neglect. And they found for the plaintiff 30*l.* damages.

And upon motion for a new trial, the Court agreed, "that in this caſe of a ſimple *depoſitum*, without a reward, the law raiſes only a promiſe not groſsly to neglect or abuſe the depoſit: and that therefore it was left properly to the jury, and conſequently there ought to be no new trial."

If, however, a bailee *without reward* receives goods, and undertakes to keep and re-deliver them ſafely, it is ſaid he is anſwerable, though he be robbed of them.

Thus, in *Southcote's* caſe, (*x*) which was an action of *detinue* for certain goods. The plaintiff declared, that he delivered them to *Bennet* (the defendant) to keep ſafe; the defendant confeſſed the delivery, and pleaded in bar, that after the delivery one *J. S.* ſtole them felonioufly out of his poſſeſſion; the plaintiff replied, that the ſaid *J. S.* was the defendant's ſervant, retained in his ſervice, and demanded judgment, &c. And thereupon the defendant demurred in law, and judgment was given for the plaintiff: and the reaſon and cauſe of the judgment was, becauſe the plaintiff delivered the goods to be ſafely kept, and the defendant had took it upon him by the acceptance upon ſuch delivery, and therefore he

(*u*) *Vide* 2 *Ld. Raym.* 913. *Jones's Law of Bailments*, 46. *But ſee Southcote's caſe*, 4 *Co.* 83. *b. et infra, contra.*

(*w*) 2 *Stra.* 1099. (*x*) 4 *Co.* 83. *b. See alſo Com. Dig.* tit. *Action on the Caſe for Miſfeaſance*, A. 3 *Wils.* 121. *Jones's Law of Bailments*, 42, *&c. But ſee* 2 *Ld. Raym.* 915. *contra.*

ought to keep them at his peril, although in ſuch caſe he ſhould have nothing for his ſafe keeping.

2. *Of Bailment of Goods with Wharfingers.*] Where goods are to be carried coaſtwiſe, and the uſage of the wharf is to deliver them on the wharf to the mate of the ſhip by which they are to be carried; if they are delivered to the mate, the wharfinger's reſponſibility is at an end, and he is not liable, though the goods are loſt from the wharf before they are ſhipped.

Thus in the caſe of *Cobban* and another v. *Downe*, (y) which was an action brought againſt the defendant, who was a wharfinger, to recover the value of a parcel of goods which had been ſent to the defendant's wharf to be forwarded to *Inverneſs*, in *Scotland*.

The plaintiff proved the ſending of four truſſes to the wharf; one of which was loſt. They were directed to be ſent by the ſhip *George*, bound for that port. The defendant proved, that the goods were brought to the wharf, and laid at the door of the the counting-houſe; that while they lay there, the mate of the *George* was called; that he came; and the truſs in queſtion was delivered to him; but what became of it afterwards did not appear.

It was contended, on the part of the defendant, that it was no part of the duty of a wharfinger, where goods are to go coaſtwiſe, either according to general uſage, or the particular uſage of the defendant's wharf, to ſee the goods actually put on board: that they were, in many inſtances delivered from the warehouſe, or from the wharf to the mate of the veſſel, to be by him and his crew put on board the veſſel; and that on the delivery to them, all further reſponſibility, on the part of the wharfinger was at an end.

Several wharfingers were called, who proved the invariable uſage to be ſo: that goods, which were not to go coaſtwiſe, were delivered from the carts on board the ſhip: that when goods came to the wharf, and no ſhip was then at the wharf bound for the port to which the goods were directed, they were warehouſed; and on the arrival of the firſt ſhip, they were delivered to the mate of the veſſel: but when a veſſel was there,

(y) 5 *Eſp. Rep.* 41.

they were immediately delivered to him to be put on board; that before the ſhipping of foreign goods, the wharfinger charged for wharfage and ſhipping; but for ſhipping goods coaſtwiſe they charged for wharfage only, conſidering that they had nothing to do with the ſhipping, being ſatisfied with a delivery to the mate, or other officer on board the ſhip, as putting an end to their reſponſibility.

Lord *Ellenborough*, Ch. J. ſaid "This is an action charging the defendant in his character of a wharfinger. What the duty of a wharfinger is, is to be meaſured by the uſage and practice of others in ſimilar ſituations, or his known and profeſſed liability. Every man contracts with the public according to the known and aſcertained extent of the trade or buſineſs in which he is engaged. The defendant has proved that, by eſtabliſhed uſage, the goods are delivered by the wharfinger to the mate and crew of the veſſel which is to carry them; from which time it has been conſidered that their reſponſibility is at an end. Undoubtedly where the reſponſibility of the ſhip begins, that of the wharfinger ends; and a delivery to the ſhip creates a liability there: but the delivery muſt be to an officer or perſon accredited on board the ſhip; it cannot be delivered to the crew at random: but the mate is ſuch a recognized officer on board the ſhip, that delivery to him is a good delivery, and the reſponſibility of the ſhip attaches, if the jury believe that the mate received the goods, as ſtated by the defendant's witneſſes. It has been ſaid, that they were loſt on the wharf before they were put on board; but if they were once well delivered to the mate, the ſubſequent loſs cannot affect the wharfinger: they are delivered into the care of the mate; and his negligence cannot revive any reſponſibility on the part of the wharfinger. I think therefore the uſage has been ſufficiently proved; that by a delivery to the mate of the ſhip the wharfinger's reſponſibility was at an end; and that the only queſtion for the jury to decide was, was the delivery made of the goods to the mate of the *George*, by which veſſel the goods were ordered to be ſent?" The jury under this direction found a verdict for the defendant.

3. *Of*

3. *Of Bailment of Goods with Warehouſemen.*] A warehouſeman is bound only to take reaſonable and ordinary care of goods depoſited in his warehouſe.

Thus, in the caſe of *Cailiff* and another v. *Danvers*, (z) which was an action of *aſſumpſit* againſt the defendant as a warehouſeman for negligently keeping a quantity of *Ginſeng*, which had been depoſited by the plaintiff in his warehouſe; whereby it had been deſtroyed and ſpoiled.

It appeared that the box containing the *Ginſeng* had been opened, by the plaintiff's directions, for the purpoſe of ſhowing it to perſons who were about to purchaſe it; that ſeveral perſons looked at it on different days, and every night the lid of the box was ſhut down, but not nailed. That many cats were kept in the warehouſe, and all poſſible care taken to deſtroy vermin; notwithſtanding which the rats had got at the *Ginſeng*, and deſtroyed it.

Lord *Kenyon*, Ch, J. ſaid: "That a warehouſeman was only obliged to exert reaſonable diligence in taking care of the things depoſited in his warehouſe; that he was not, like a carrier to be conſidered as an inſurer, and liable for all loſſes happening otherwiſe than by the act of *God*, or the King's enemies; and that the defendant, in the preſent caſe, having exerted all due and common diligence for the preſervation of the commodity, was not liable to any action for this damage which he could not prevent." The plaintiff was therefore nonſuited.

A warehouſeman, however, is liable for goods loſt or injured, from the time the crane is applied to raiſe them into the warehouſe; and it is no defence that they were injured by falling into the ſtreet from the breaking of the tackle, the carman who brought the goods having refuſed the offer of ſlings for further ſecurity.

Thus, in the caſe of *Thomas* and others v. *Day*, (a) the declaration ſtated, that in conſideration that the plaintiff had ſent and delivered ſix packs of linen to be houſed, lodged and warehouſed, in a certain warehouſe of the defendant, the defendant undertook ſafely and ſecurely to take care of, lodge and warehouſe them: the breach aſſigned was, that he did not ſafely and ſecurely

(z) *Peake's Cas. N. P.* 114. (a) 4 *Eſp. Rep.* 262.

lodge, houſe, and warehouſe them; that two packs of linen were damaged and ſpoiled by being left in the open ſtreet, after falling on the pavement, and thereby wetted and ſpoiled.

The facts proved were, that the plaintiffs were ſhipping-brokers; the defendant was a warehouſeman; that on the 2d *July* they had ſent the ſix packs of linen in queſtion to the defendant's warehouſe: that the perſon ſent ſaw the defendant's clerk, who gave him the tackle which he applied to the packages; and removed five into the warehouſe; and the ſixth was left in the crane when he went away, the defendant's ſervant having paid the carriage.

Another witneſs then proved, that in a ſhort time after, going by, he found one of the packs in the ſtreet which was drenched in water, and ſeventy-nine pieces of linen ſpoiled.

The defendant denied that he was liable to make good the damages, on the ground that the accident had happened from the cords of the packs breaking, his ſervant having offered to give ſlings to the carman to make them more ſecure; which had been refuſed: that it was the duty of the perſon ſending the goods to ſee that they were well-corded and ſecured, ſo that if any accident happened from their breaking the warehouſeman was not liable. Theſe facts he propoſed to prove, and in addition thereto, that warehouſemen did not conſider themſelves as liable by uſage, under the circumſtances above ſtated.

But Lord *Ellenborough*, Ch. J. ſaid: "The whole queſtion turned upon the ſingle point of, when the warehouſeman's liability commenced, and the agency of the carman ended? For until the goods were delivered to the warehouſeman, the carman was to be conſidered as the agent of the perſon ſending them; but when the warehouſeman took them into his own hands, the moment the warehouſeman applied his tackle to them, from that moment his liability commenced. It has been urged, that the defendant's ſervants offered him the uſe of ſlings. Theſe are provided by the defendant; and he is bound to ſee that they are of ſufficient ſtrength and fit for the purpoſe; and he ſhould not apply his tackle unleſs that could be performed which he was bound to do. If the ſlings were neceſſary, the refuſal of the carman, or his declining the uſe of them, will not exempt the warehouſeman: he ought to have inſiſted on the carman's uſing them; and if he refuſed, he ſhould have repudiated thoſe goods, and

and refuſed to accept them. It appears here, that the damaged pack of linen was in the crane, and lifted from the cart, it was then in his poſſeſſion; and being ſo, I think, in point of law, he is liable for the loſs." The jury accordingly found a verdict for the plaintiff.

5. *Of Contracts of Bailment upon a letting to Hire where the Goods, &c. are either to be uſed, or ſome Labour is to be performed upon them.*

Where goods are *lent for hire*, it is ſaid, (*b*) that the bailee is bound to take the utmoſt care, and to return the goods when the time of hiring is expired. The ſort of care here mentioned, is ſuch as the moſt diligent father of a family uſes; and if that is uſed the bailee ſhall be diſcharged. But Sir *William Jones* obſerves, (*c*) "That the law only requires of a hirer the ſame degree of diligence that all prudent men, that is, the generality of mankind, uſe in keeping their own goods; and the juſt diſtinction between borrowing and hiring, which the *Jewiſh* law-giver emphatically makes, by ſaying, "If it be an hired thing, it came for "its hire," remains eſtabliſhed by the concurrent wiſdom of nations in all ages. If *Caius*, therefore, hire a horſe, he is bound to ride it as moderately, and treat it as carefully, as any man of common diſcretion would ride and treat his own horſe; and if, through his negligence, as by leaving the door of his ſtable open at night, the horſe be ſtolen, he muſt anſwer for it; but not if he be robbed of it by a highwayman, unleſs by his imprudence he gave occaſion to the robbery, as by travelling at unuſual hours, or by taking an unuſual road: if, indeed, he hire a carriage and any number of horſes, and the owner ſend with them his poſtilion or coachman, *Caius* is diſcharged from all attention to the horſes, and remains obliged only to take ordinary care of the glaſſes and inſide of the carriage while he ſits in it."

And he concludes thus: "Since the negligence of a ſervant, acting under his maſter's directions, expreſs or implied, is the negligence of the maſter; it follows, that if the ſervant of *Caius*

(*b*) 2 *Ld. Raym.* 916. *See alſo Bul. N. P.* 72. (*c*) *Page* 88.

injure

injure or kill the horſe by riding it immoderately, or by leaving the ſtable door open, ſuffer thieves to ſteal it, *Caius* muſt make the owner a compenſation for his loſs; and it is juſt the ſame if he take a ready furniſhed lodging, and his gueſts or ſervants, while they act under the authority given by him, damage the furniture by the omiſſion of ordinary care. At *Rome* the law was not quite ſo rigid; for *Pomponius*, whoſe opinion on this point was generally adopted, made the maſter liable only where he was culpably negligent in admitting careleſs gueſts or ſervants, whoſe bad qualities he ought to have known: but this diſtinction muſt have been perplexing enough in practice; and the rule which, by making the head of a family anſwerable indiſcriminately for the faults of thoſe whom he receives or employs, compels him to keep a vigilant eye on all his domeſtics, is not only more ſimple, but more conducive to the public ſecurity, although it may be rather harſh in ſome particular inſtances."

The laſt kind of bailment which remains to be mentioned is, when work and labour, or care and pains are to be performed or beſtowed on the thing bailed. And it is ſaid, (*d*) "if one deliver ſilk or velvet to a taylor for a ſuit of clothes, or a gem to a jeweller to be ſet or engraved, or timber to a carpenter for the rafters of his houſe, the taylor, the engraver, and the builder are not only obliged to perform their ſeveral undertakings in a workmanly manner, but, ſince they are entitled to a reward, either by expreſs bargain or by implication, they muſt alſo take ordinary care of the things reſpectively bailed to them: and thus, if a horſe be delivered either to an agiſting farmer for the purpoſe of depaſturing in his meadows, or to an hoſtler to be dreſſed and fed in his ſtable, the bailees are anſwerable for the loſs of the horſe, if it be occaſioned by the ordinary neglect of themſelves or their ſervants. It has, indeed, been adjudged, that if the horſe of a gueſt be ſent to paſture by the owner's deſire, the innholder is not, as ſuch, reſponſible for the loſs of him by theft or accident; and in the caſe of *Moſely* and *Foſſet*, (*e*) an action againſt an agiſter for keeping a horſe ſo negligently that it was ſtolen, is ſaid to have been held maintainable only by reaſon of a ſpecial aſſumption; but the caſe is differently reported by *Rolle*, who mentions no ſuch reaſon; and, according

(*d*) *Jones's Law of Bailments*, 91, &c. (*e*) *Mo.* 543. 1 *Rol. Abr.* 4.

to

to him, Chief Juſtice *Popham* advanced generally, in conformity to the principles before eſtabliſhed, that "If a man, to whom "horſes are bailed for agiſtment, leave open the gates of his "field, in conſequence of which neglect they ſtray and are "ſtolen, the owner has an action againſt him:" It is the ſame if the innkeeper ſend his gueſt's horſe to a meadow of his own accord, for he is bound to keep ſafely all ſuch things as his gueſts depoſit within his inn, and ſhall not diſcharge himſelf by his own act from that obligation; and even when he turns out the horſe by order of the owner, and receives pay for his graſs and care, he is chargeable, ſurely for ordinary negligence as a bailee for hire, though not as an innkeeper by the general cuſtom of the realm."

But if *A.*, a general merchant, undertakes voluntarily, and without reward, to enter a parcel of goods of *B.*, together with a parcel of his own, of the ſame ſort, at the cuſtom-houſe for exportation, but makes the entry under a wrong denomination, whereby both parcels are ſeized; *A.*, (having taken the ſame care of the goods of *B.* as of his own, not having received any reward, and not being of a profeſſion or employment which neceſſarily implied ſkill in what he had undertaken,) is not liable to an action for the loſs occaſioned to *B.* (*f*)

(*f*) Shiells *and another* v. Blackburne, 1 *H. Blac.* 158.

CHAPTER

CHAPTER X.

Of Contracts to deliver up Securities, &c.

IF *A.* be bound in an obligation of 60*l.* to *B.* conditioned for payment of 30*l.* at a day to come, and after the day of payment, the 30*l.* not being paid, in conſideration that *A.* would pay the 30*l.* to *B.* in ſatisfaction of the obligation *B.* promiſes that he will accept it in ſatisfaction, and that he will deliver up the obligation: if *B.* does not deliver up the obligation, *A.* may have an action upon the caſe upon this promiſe, for though legally, after the obligation forfeited 30*l.* can be no ſatisfaction of 60*l.*, yet to have the money in his hands without ſuit is a good conſideration to maintain this action upon the promiſe. (*a*)

So, (*b*) where arbitrators being about to award that *R.*, the defendant, ſhould deliver up to the plaintiff two ſeveral obligations to be cancelled; wherein the plaintiff was bound to the defendant, he (the defendant) in conſideration that this matter ſhould be left out of the award, promiſed that he would deliver them up *gratis*, &c. but did not, and afterwards put the bonds in ſuit, whereupon the plaintiff brought his action, and ſet forth this matter, and that the ſaid clauſe was omitted to be inſerted in the award *ad ſpecialem inſtantiam ipſius querentis*; and judgment was given for him.

So, in the caſe of *Alcorn*, executor, v. *Weſtbrook*, (*c*) which was an action of *aſſumpſit*. And the declaration ſet forth that the plaintiff's teſtator delivered to the defendant a certain writing obligatory, whereby *A.* was bound to him in the ſum of 300*l.*, &c., he, the de-

(*a*) 1 *Rol. Abr.* 22. *pl.* 24. *See alſo* 1 *Leon.* 238. *Cro. Eliz.* 194. 1 *Lev.* 198, 199. *Palm.* 169. *S. P.*
(*b*) 3 *Leon.* 105. 1 *Dan. Abr.* 58. *pl.* 63. (*c*) 1 *Wils.* 115.

fendant,

fendant, upon payment of 22*l.* by the teſtator to him, promiſed to re-deliver the ſaid bond to teſtator upon requeſt; and that the defendant, notwithſtanding he was requeſted, did not deliver the bond either to the teſtator in his life-time, or to the plaintiff ſince his death. The caſe was, that the teſtator depoſited the bond in the hands of the defendant as a pledge or ſecurity for the payment of 22*l.*; that the teſtator tendered the 22*l.* to the defendant, and demanded the bond, which he refuſed to deliver up. It was objected, on the part of the defendant, that the plaintiff had miſconceived his action, and that there was no precedent of an *aſſumpſit* to deliver up a pledge in all the books, but that the proper form of action was *trover* or *detinue*. But the Court, after taking time to conſider, were unanimouſly of opinion, that this action of *aſſumpſit* would well lie; for as the money was tendered and refuſed; it muſt be conſidered as paid, and then the promiſe to re-deliver the bond ariſes by operation or conſtruction of law.

CHAPTER

CHAPTER XI.

Of Contracts for Neceſſaries.

1. *OF Neceſſaries found for Children.*] A father is bound to provide neceſſaries for his own children. But a ſecond huſband cannot at law be compelled to maintain his wife's children by a former huſband. Indeed, if the ſecond huſband do maintain ſuch children it is a good conſideration for a promiſe by them when they come of age to repay the expence of their maintenance reſpectively; eſpecially where the ſecond huſband is a man of ſmall ſubſtance, and the children have a competent proviſion to receive when they come of age, and he made no application to *Chancery* for an allowance out of the fund, as he might have done.

Thus in the caſe of *Cooper* v. *Martin*, (*a*) which was an action of *aſſumpſit* for meat, drink, waſhing, lodging, and other neceſſaries provided by the plaintiff for the defendant for ſeven years. At the trial, before *Groſe*. J. at the *Spring Aſſizes*, 1803, for the county of *Suffolk*, the caſe appeared to be as follows: The defendant was the ſon of the plaintiff's wife by a former huſband, and he and three other children of the former marriage were maintained by the plaintiff for ſeveral years during their minority; and after the defendant came of age, and a demand was made upon him by the plaintiff for the expences of his maintenance, the defendant promiſed to pay it. The ſituation of the family was this; the defendant's father died inſolvent, and the plaintiff did not appear to have any ſubſtance of his own, having been obliged to ſell a ſmall eſtate, which he had at the time of his marriage, to ſatisfy certain creditors to whom his wife had bound herſelf for her for-

(*a*) 4 *Eaſt Rep.* 76.

mer

mer huſband's debts. But ſhe had a freehold eſtate of about 100*l.* *per annum* clear value, with a houſe upon it, in which ſhe and her children were living when ſhe married the plaintiff, and in which they all continued to reſide for ſome years, till the defendant left them, when about the age of nineteen. This eſtate of her's, and the fortune of the defendant and the reſt of her children came to them by the will of her uncle, whereby he deviſed all his meſſuages, lands, &c. at *Wickham*, to certain truſtees, in truſt, to pay the clear rent and profits to his neice *Ann*, the wife of *John Martin*, during her life, for her own ſeparate uſe; remainder to certain of her children. He then deviſed about 20*l.* a year in land to each of her children, (including the defendant,) with a proviſo in caſe of the death of any of the children before the age of twenty-one years reſpectively, without leaving iſſue of their body, that the eſtate ſo given to the child ſo dying was to be ſold by the truſtees, and the money to be ſhared among the ſurvivors, as and when they ſhould reſpectively come of age. And to each of the children was further given a legacy of 500*l.*, and the teſtator directed the ſame, with the accumulating intereſt, to be paid as and when they ſhould reſpctively attain the age of twenty-one years, with the ſame proviſo as before in caſe of the death of either before age.

It appeared that the plaintiff had brought up the children, and given them boarding in a manner ſuitable to their expectations, but beyond what could have been expected of him, upon a ſuppoſition that no proviſion was made for them out of which he might thereafter be reimburſed when they came of age. A ſiſter of the defendant, who ſtill lived in the plaintiff's family proved that in a converſation with the defendant, in which ſhe had mentioned her own intention of paying for her board, the defendant ſaid that he ſhould have paid the plaintiff, but for his elder brother, who had adviſed him not to do ſo. The plaintiff's claim was at the rate of twenty guineas a-year board, waſhing, and lodging; for five years and upwards. The learned judge left it to the jury, whether the plaintiff had ſupplied the defendant with more than his ſtate and condition required? that if he had not, or to the extent at leaſt that was neceſſary and proper, it was a meritorious conſideration to ſupport the promiſe made by the defendant after he came of age. The jury were of opinion that the expence incurred by the plaintiff in the maintenance of the defendant amounted to 20*l.* a-year, but that according to the defendant's ſtate and condition there ought not to have been more than 10*l.* a-year

a-year expended upon him; and therefore they found a a verdict for the plaintiff for 50*l.* for 5 years. And the defendant had leave to move for a rule either to enter a nonſuit, if the Court thought that the action was not maintainable, or why a new trial ſhould not be had. A motion to this effect was accordingly made in the court of *King's Bench.* But that Court, after argument, were of opinion that the action was maintainable; and therefore refuſed the rule.

Lord *Ellenborough*, Ch. J. ſaid: "As to the general obligation of parents and children to provide for each other, in *Tubb*, v. *Harriſon* (*b*) which is the lateſt deciſion upon the ſubject, and in which the other authorities were conſidered, it was holden to extend only to *natural relations.* Then the plaintiff, not ſtanding in that relation to his wife's children by her former huſband, was not bound by the act of marriage with their mother to maintain them, but ſtood in that reſpect in the ſituation of any other ſtranger. And having done an act beneficial for the defendant in his infancy, it is a good conſideration for the defendant's promiſe after he came of age. In ſuch a caſe the law will imply a requeſt; and the fact of the promiſe has been found by the jury. The caſes both at law and in equity have certainly gone on conſidering a child ſo circumſtanced as being entitled to maintenance out of the fund, and the plaintiff might have applied to *Chancery* for an allowance in this caſe: but though he did not make ſuch application, but expended his own funds for the benefit of the defendant, it is a good conſideration at leaſt for the ſubſequent promiſe to repay him."

Lawrence J. "The early caſes referred to (*c*) proceeded upon a miſtake in conſidering the maintenance of the children as a debt of the mother, who has married a ſecond huſband, or as a debt on her eſtate. The wants of the children are only a ground for an order of maintenance on the parent if of ſufficient ability. But when ſhe has parted with that ability by her ſecond marriage ſhe is no longer liable. The huſband only takes her debts; but this is no debt of hers. Ceaſing to be of ability, the maintenance of the the children could not have been enforced by an order againſt her, and therefore could not have been enforced at all. Then the plaintiff having conferred the benefit without any obligation, it is

(*b*) 4 *Term Rep.* 118. (*c*) *Sty.* 283, 2 *Bulſtr.* 346. *Comb.* 321. *Foley* 39. 42.

a good

a good conſideration for the promiſe by the defendant after he came of age."

But, if a huſband receives his wife's children by a former huſband into his houſe, and they become part of his family, he ſhall be deemed to ſtand *loco parentis*, and be liable to a contract made by his wife for their education.

Thus, in the caſe of *Stone* v. *Carr*, (*d*) which an action of *aſſumpſit*, brought by the plaintiff who was a ſchoolmaſter for the education and maintenance of an infant child. It was proved that the child was the ſon of the defendant's wife, by a former huſband. On the defendant's marriage with the child's mother, he had taken poſſeſſion of an houſe which ſhe occupied with her children, and which houſe had belonged to the firſt huſband: the buſineſs ſhe had carried on was continued, and the children were ſuffered to live with him as part of the family, and provided for by him while he was at home.

For the defendant it was given in evidence —that he was gunner of an *India* ſhip; that during his abſence on a voyage, the boy had been put to ſchool by his mother to the plaintiff. His counſel then contended, that as he had never made any contract, or agreement with the plaintiff, he could not be charged, by reaſon of any implied liability; and cited the caſe of *Tubb* v. *Harriſon*, (*e*) as in point.

Lord *Kenyon*, Ch. J. after referring to the caſe cited, ſaid the preſent was diſtinguiſhable from that: "there was no doubt if a man married a woman having children by a former huſband, he might refuſe to provide for them, and under the authority of the *King* v. *Munden*, cited in that caſe of *Tubb* v. *Harriſon*, he could not be compelled to do it; but if a man did not ſo refuſe to entertain them, and took the children into his family, he then ſtood *loco parentis* as to them. Such was the caſe here: he had ſo adopted them, and having gone abroad, and left them in the care of his wife, he ſhould hold him to be bound by her contracts made for their maintenance and education. If ſhe had any property by her firſt huſband, the caſe was ſtronger; for then part of the property of which the defendant poſſeſſed himſelf, belonged to the children: but even had their father died inſolvent, it would not alter his opinion. The defendant on his marriage had no right

(*d*) 3 *Eſp. Rep.* 1. (*e*) *Ante, Vol.* 1. *p.* 167.

to take poſſeſſion of the houſe and buſineſs: he had thereby confounded all the boundaries of the property, and placed himſelf in a ſtate of reſponſibility. He therefore directed the jury to find a verdict for the plaintiff, which they did accordingly.

So, if a huſband, living in a ſtate of ſeparation from his wife, ſuffers his *own* children to reſide with their mother, he is liable for neceſſaries furniſhed to the children: for, as a father, he has a right to the cuſtody of his children, and may obtain poſſeſſion of their perſons by *habeas corpus*; but where he does not aſſert that right, and ſuffers them to remain with their mother, he thereby conſtitutes her his agent, and authorizes her to contract thoſe debts for clothing and other neceſſaries; but this is matter which ſhould be left to the jury. (*f*)

So, an action will lie for a meat and drink found and provided for a *baſtard child* upon an expreſs promiſe. (*g*)

So, in an action of *aſſumpſit* on an expreſs promiſe to pay for the maintenance of a baſtard child, of which the defendant was the putative father, it is no defence that he has ſince diſcovered that the child was not begotten by him.

Thus, in the caſe of *Shaw* v. *Whiteman*, (*h*) which was an action of *indebitatus aſſumpſit* for board, &c. found and provided by the plaintiff for a child at the defendant's requeſt. The plaintiff proved, that ſhe being delivered of the child, for whoſe maintenance the action was brought, and the defendant believing the child to be his, agreed that ſhe ſhould provide all neceſſaries for the child, and that he would pay her 7*s.* a week. The defendant continued to pay that money till the month of *Auguſt*, 1788, when he refuſed to pay any further allowance whatever. The plaintiff had not ſworn the child to the defendant before a magiſtrate. The defendant admitted the caſe proved by the plaintiff, but offered to prove, that the reaſon of his refuſal to pay the allowance, was that he had diſcovered that the child was not his, but that one *Farrer*, with whom the plaintiff had alſo been connected, was the father of it. His counſel contended that by proving this fact they ſhould ſhow there was no conſideration for the promiſe, and that it was therefore void.

But Lord *Kenyon*, Ch. J. was of opinion "that this evidence could

(*f*) Per *Lord* Eldon. *Ch. J.* 3 *Eſp. Rep.* 252.
(*g*) Per Pemberton, *Ch. J.* 2 *Sho.* 184. (*h*) *Peake's Cas. N. P.* 29.

could not be received on the preſent iſſue. The jury could not here try who was the father of this child, but muſt confine themſelves to the contract. If the child was not the defendant's he might relieve himſelf by applying to a magiſtrate for an order of filiation." Under this direction the jury gave a verdict for the plaintiff.

2. *Of Neceſſaries provided for Apprentices.*] In an action for neceſſaries provided for an apprentice, if the declaration ſtates "that the defendant is indebted, &c to the plaintiff for meat, drink, &c. furniſhed to the defendant's *apprentice*," the plaintiff muſt prove him to be legally an apprentice; and if the indenture of apprenticeſhip has not been legally ſtamped, the plaintiff cannot recover on thoſe counts ſo laid.

Thus, in *Aldridge* v. *Ewen*, (*i*) which was an action of *aſſumpſit* brought to recover a ſum of money for the board and lodging of a ſon of the plaintiff, whom he alledged he had bound apprentice to the defendant. The plaintiff had notice to produce the indenture of apprenticeſhip. A witneſs proved, that he had been employed to prepare it, and that it was ſuggeſted, it would ſave expences to have it executed at *Perth* in *Scotland*: that it was prepared and brought from *Perth*, and was, in fact, executed at *Wapping* by the plaintiff; but that there was no ſtamp to it.

For the defendant, it was contended that the plaintiff muſt be nonſuited, as he had not proved any legal apprenticeſhip of the perſon for whoſe board and lodging the plaintiff ſought to recover. To this the counſel for the plaintiff anſwered, that he could prove the defendant having taken the young man as an apprentice, and of his having ſerved the defendants in that capacity; and that that would ſatisfy the averment in the declaration.

But Lord *Kenyon*, Ch. J. ſaid: "The plaintiff declares on a contract for neceſſaries furniſhed to the defendant's apprentice; and this is ſo ſtated in the declaration. To entitle the plaintiff to recover, therefore, it muſt appear, that the relation of maſter and apprentice legally ſubſiſted between the parties, as it is in that character only the defendant is charged. This has not been made out by the plaintiff. An apprentice can only be bound by indenture; that indenture muſt be legally ſtamped. The articles of apprenticeſhip in this caſe appear to have been prepared at *Perth*

(*i*) 3 *Eſp. Rep.* 188.

and executed at *Wapping*, and to have no legal ſtamp. They are therefore void; and the plaintiff has failed in proving this neceſſary averment, and cannot recover."

3. *Of Neceſſaries provided for the Uſe and Accommodation of a Club.*] Where *A. B.* and *C.* on behalf of themſelves and other members of a club, enter into articles with *D.* to provide neceſſaries for the uſe and accommodation of the club, they are perſonally bound by ſuch articles; and *D.* is not obliged to reſort to any of the other members for ſatisfaction of his demands (*k*)

4. *Of Neceſſaries, &c. provided for Voters at Elections.*] It being contrary to 7 & 8 *W.* 3. *c.* 4. for a candidate to furniſh proviſions to any voters after the *teſte* of the writ, an innkeeper cannot recover againſt a candidate for proviſions ſo furniſhed at his requeſt.

Thus, in the caſe of *Ribbans* v. *Crickett* and another, (*l*) the plaintiff was an innkeeper, and the defendants two of the candidates at the laſt election of repreſentatives in parliament for the borough of *Ipſwich*. The action was brought on a bill for proviſions furniſhed to the voters of the borough, at the requeſt of the defendants, conſiſting of three deſcriptions of charges; viz. 1ſt, for proviſions furniſhed before the *teſte* of the writ; 2dly, for proviſions furniſhed after the *teſte* of the writ to voters reſident in the borough; 3dly, for proviſions furniſhed to voters not reſident in the Borough. The defendants paid into court ſufficient to cover the charges of the firſt and laſt deſcription. At the trial before *Aſhhurſt*, J. the defendants conteſted the amount of the bill, and endeavoured to prove that the plaintiff had charged for proviſions furniſhed to perſons not voters; but having failed to eſtabliſh that defence a verdict was found for the plaintiff. But a rule was afterwards obtained to ſhow cauſe why the verdict ſhould not be ſet aſide and a new trial granted on the ground that part of the cauſe of action was contrary to the 7 *W.* 3. *c.* 4. and the Court of *Common Pleas* determined in favour of the defendant, and made the rule abſolute.

Eyre, Ch. J. ſaid: "It ſeems to be the opinion of the whole Court, that if the defendants think proper to inſiſt on their objection, they muſt do it with ſucceſs. This action is apparently founded on a contract to diſobey the law, being to provide enter-

(*k*) *Vide* Cullen v. Duke of Queenſbury *and others*, 1 *Bro. C. P.* 396.
(*l*) 2 *Bos. and Pul.* 264.

tainment

tainment for voters during an election. The defence ſet up proves the principle of the contract, for the point conteſted at the trial was, whether or not the plaintiff had abuſed the confidence repoſed in him, by ſquandering the proviſions among perſons who were not voters? Then how ſhall an action be maintained on that which is a direct violation of a public law? The contract is bottomed in *malum prohibitum*, of a very ſerious nature in the opinion of the legiſlature, as appears by the preamble of 7 & 8 *W.* 3. *c.* 4. How then can we enforce a contract to do that very thing which is ſo much reprobated by the act? I am perfectly aware that great difficulties may ariſe from conſtruing this act rigidly, but perhaps ſtill greater will ariſe if it be not ſo conſtrued. It is true that a voter who comes from a diſtance may have reaſon to complain if he is not provided with neceſſaries; but it is alſo obvious that if the candidate can ſupply him, he may ſupply himſelf. If any exception is to be allowed for voters not reſident, the whole miſchief complained of in the act will neceſſarily follow. It will be impoſſible for the candidate to make a diſtinction between thoſe voters who reſide at a diſtance, and thoſe who live within half a mile of the place of voting. The legiſlature has drawn a ſtrict line which is not to be departed from: it ſays, that after the teſte of the writ no meat or drink ſhall be given to the voters by the candidate; and that being the caſe, this court cannot give any aſſiſtance to the plaintiff conſiſtently with the principles which have governed the courts of juſtice at all times, and with the caſes which have been cited this day. Perſons who engage in this kind of tranſactions muſt not bring their caſes before a court of law. With regard to the money paid into court, it is to be obſerved, that ſuch payment is only an admiſſion of a legal demand, and we cannot allow it to be applied to an illegal account."

CHAPTER XII.

Of Contracts for Services and Works.

IF a perſon is employed to do or tranſact any buſineſs or employment for another, and it is expreſsly agreed between the parties that it ſhall be completed for a particular ſum of money, and the work is finiſhed accordingly, an action of *indebitatus aſſumpſit* will lie for the money ſo agreed to be given: but if no expreſs agreement be entered into, as to the ſum to be paid, the law will imply that the hirer undertook, or aſſumed to pay the perſon employed ſo much as his labour reaſonably deſerved; and upon this implied promiſe an action of *aſſumpſit* on a *quantum meruit* will lie.

So, where a perſon is employed to do or perform ſome particular work, or profeſſional buſineſs for hire, the law implies that the perſon ſo engaged not only undertakes to do the work, &c. but alſo to uſe all due diligence, ſkill, and attention in the execution thereof; ſo that if he either refuſes to do or complete the work, or does it in an unſkilful and improper manner, he will be liable to an action of *aſſumpſit*, at the ſuit of the hirer, for the amount of the damages which he may ſuſtain in conſequence thereof.

So, when one man engages either to ſerve or employ another for hire, but afterwards refuſes ſo to do, he is liable to the ſame kind of action.

In

In the preſent chapter, the caſes upon this claſs of contracts will be arranged as follow:

Of Services and Works either Done or to be Done

1. *By Carpenters and Builders.*
2. *Surveyors.*
3. *Surgeons and Apothecaries.*
4. *Phyſicians.*
5. *Counſel.*
6. *Attornies and Solicitors.*
7. *Proctors.*
8. *Commiſſioners to examine Witneſſes.*
9. *Arbitrators.*
10. *Clergymen.*
11. *Performers on the Stage.*
12. *Proprietors of Stage Coaches, and Poſt Chaiſes to carry Paſſengers.*
13. *In the Salvage of Ship and Goods.*
14. *Procuring an Act to be done.*
15. *Endeavouring to obtain a Pardon.*
16. *Giving Information, and aſſiſting Perſons to recover Money Bequeathed to them, &c.*
17. *Voluntarily, though with a View of being rewarded by a Legacy, &c.*

Of Services and Works either Done or to be Done.

1. *By Carpenters and Builders.*]—Where a carpenter or builder agrees to erect any building for a particular sum of money, but additions or alterations are afterwards made, the tradesman is bound by the contract, as far as it can be traced, and entitled to recover upon a *quantum meruit* for the excess only.

Thus, in the case of *Pepper* v. *Burland*, (*a*) which was an action of *assumpsit* for work and labour as a carpenter. The defendant proved, that the plaintiff contracted to do all the carpenter's work necessary to be done in a house which the defendant was building, for a certain sum. It was admitted that the roof of the house had been done in a manner different from that specified in the contract; and the defendant had paid money into court sufficient to cover the excess.

A plan was produced, and proved by the plaintiff, wherein the dimensions of the house were stated to be fifteen feet; but the house on which the work was done was seventeen feet. It did not appear that the plaintiff had ever seen this plan before he began to work; but the house was begun by the bricklayer, on the scale of seventeen feet, before any contract was made with the plaintiff.

Lord *Kenyon*, Ch. J. said, "I have often declared, and have had the good fortune to have my opinion adopted by juries, that where some additions are made to a building which the workman contracts to finish for a certain sum of money, the contract shall exist, as far as it can be traced to have been followed, and the excess only paid for according to the usual rate of charging. I think that the plaintiff has failed in shewing the plan by which he contracted to work to be the same as that produced. I admit that if a man contracts to work by a certain plan, and that plan is so entirely abandoned that it is impossible to trace the contract, and to say to what part of the work it shall be applied, in such case the workman shall be permitted to charge for the whole work done by measure and value, as if no contract at all had ever been made: but in the present case the contract is not proved to have been wholly abandoned; for it appears that the dimensions were the same when the plaintiff contracted as they were when the

(*a*) *Peake's Cas. N. P.* 103.

building

building was finiſhed: the only exceſs was in the alteration of the roof; and money enough to cover that has been paid by the defendant into court.

In an action of *aſſumpſit*, by a carpenter, upon a *quantum meruit* for work and labour done, and materials found, it is competent to the defendant, even without notice to the plaintiff, to prove that the work done was not worth ſo much as the plaintiff claims: and if it appear that the plaintiff has been paid on account as much as the work was worth, he cannot recover. And ſo it ſeems that the defendant may be let into ſuch a defence where the contract was for the work to be done at a certain price; at leaſt if he give the plaintiff previous notice of ſuch defence, ſo that he may be prepared to meet it.

Thus, in the caſe of *Baſton* v. *Butter*, (*b*) which was an action of *aſſumpſit* for work and labour done, and materials found, with the common counts. Plea *non aſſumpſit*. At the trial before Mr. Baron *Thompſon*, at *Exeter* aſſizes, the plaintiff's witneſſes proved that the defendant, who was a farmer, employed the plaintiff, a carpenter, to do ſome work for him on his farm; and the plaintiff's workmen put on a roof on a linhay, and alſo roofed a barn, (the defendant finding the timber and nails,) and alſo made gates on the farm, and rails near the houſe: and the plaintiff demanded 3*l.* 14*s.* 7*d.* as now due; but his witneſſes did not make out above 3*l.* On the part of the defendant it was ſtated, that it would be proved that the work had been done by the plaintiff in a very improper and inſufficient manner; that the linhay was too weak in the roof; which, after being covered with thatch, ſunk in the middle, ſo as to let the water through; and that neither the rafters or roof of the linhay or the barn were ſufficiently ſupported. And therefore it was contended, that the plaintiff was not entitled to recover what he now claimed, as remaining due to him. *E contra* it was inſiſted, that this was no anſwer to the action; but that if the work had not been properly done, it was the ſubject of a croſs action, by the defendant, againſt the plaintiff. The learned Judge was inclined to have admitted the defendant into evidence of this defence; but, upon the authority of a caſe of *Broom* v. *Davis*, which was cited, he rejected the evidence propoſed; and the

(*b*) 7 *Eaſt Rep.* 479. *Et vide* Kanaen v. M'Mullen, *poſt* 312.

plaintiff

plaintiff recovered a verdict for 3*l.* with liberty to the defendant to move for a new trial; which was moved accordingly.

The case of *Broom* v. *Davis*,(c) just cited was an action of *assumpsit* for the price of erecting a booth on *Bath* race ground. The plaintiff proved that the measure of the booth was settled between him and the defendant; that he was to have twenty guineas for building it, five or which were paid beforehand, and to take back the materials after the races; and that he did build it according to the stipulated dimensions. The defendant proved that the booth fell down in the middle of the races, owing to bad materials, and bad workmanship, and that the plaintiff was fully apprized of both; and contended, that as the plaintiff had not built a booth to answer the purpose, he ought not to be paid the remainder of the twenty guineas. But *Buller*, J. ruled, that this was no defence to the present action, especially as a particular sum was specified, and part of it paid; though a cross action might be brought against the present plaintiff for building the booth improperly.

The counsel for the defendant, in the principal case, said, that there were contradictory decisions on the point: for in *Duffit* v. *James*, at the sittings at *Westminster*, in *June*, 1788, which was an action to recover the amount of a surgeon's bill, Lord *Kenyon* permitted the defendant to give evidence of unskilful treatment of him by the plaintiff; taking the distinction where the demand was for skill, where the question might be, whether the plaintiff were entitled to any thing or nothing; and where the action was for goods sold and delivered, or other certain thing of value, not depending on skill; and considering the case in judgment before him as a mixed question, where the demand was in part for skill, as well as for medicine. There was also another case of *Cormack* v. *Gillis*, *Middlesex* sittings after *Easter*, 1788, in *assumpsit* for goods sold and delivered. The case was, that the plaintiff was a seedsman, and sold to the defendant, who was a gardener, seeds, with a warranty that they were of the sorts and quality for which they were sold. *Buller*, J. held, that the plaintiff was entitled to recover the price agreed on; and that the defendant was not at liberty to show that the seeds were not of the sort, &c. but must bring his cross action if the warranty were not complied with.

(c) *At the Lent Assizes*, 1794, *cor.* Buller, J. 7 *East Rep.* 480. *n. a.*

And

And the plaintiff having recovered, *Gillis* did bring his croſs action againſt *Cormack*, which was tried before Lord *Kenyon*, at the ſittings in *Middleſex*, after *Hilary*, 1789; and, in the courſe of the cauſe, what had paſſed in the former trial was mentioned to Lord *Kenyon*, who ſeemed to be of opinion, that the non-compliance with the warranty might have been given in evidence, in the former action, in reduction of the damages, or to ſhow that the ſeeds delivered were of no value.

And, in addition to the above caſes, the reporter adds the following:

King v. *Boſton*, *Middleſex* ſittings after *Eaſter*, 1789. The plaintiff had ſold to the defendant a horſe, warranted ſound, for twelve guineas, of which the defendant had paid three. In fact, the horſe was not ſound; and the defendant refuſing to pay any more, this action was brought for the value of the horſe ſold, to recover the difference. It was proved that the horſe, at the time of the ſale to the defendant, was not worth more than 1*l.* 11*s.* 6*d.* and the defendants afterwards ſold it for 1*l.* 10*s.* Lord *Kenyon* held that the plaintiff could only recover the value; and more having been paid to him by the defendant, he nonſuited the plaintiff.

In the principal caſe the counſel for the defendant, in anſwer to the caſes cited by the defendant's counſel, contended, that if the work ſtipulated for were improperly done, the damage is recoverable in a croſs action; but that is no objection to the plaintiff's recovering in this action the full value of the materials found, and labour employed and paid for by him: and it was obſerved, that this ſort of defence was a ſurprize upon the plaintiff.

The court determined, that as the plaintiff's claim was upon a *quantum meruit*, the evidence offered at the trial, on behalf of the defendant, ought to have been received; and therefore they made the rule abſolute for a new trial; and the Judges delivered their opinions *ſeriatim* as follow:

Lord *Ellenborough*, Ch. J. ſaid, "In ſome caſes the plaintiff may not be prepared to meet an objection of this ſort at the trial; but it does not appear here what had previouſly paſſed upon the ſubject between the parties. Where a ſpecific ſum has been agreed to be paid by the defendant, the plaintiff may have ſome ground to complain of ſurprize, if evidence be admitted to ſhow that the work done and materials provided were not worth ſo much as

was

was contracted to be paid; because he may only come prepared to prove the agreement for the specific sum and the work done, unless notice be given to him that the payment is disputed, on the ground of the inadequacy of the work done. But where a plaintiff comes into court upon a *quantum meruit*, he must come prepared to show that the work done was worth so much; and therefore there can be no injustice to him in suffering this defence to be entered into, even without notice: and that used to be the practice before Mr. Justice *Buller*."

Grose, J. "The plaintiff in this action must, at all events, have been prepared to show what he was entitled to receive for the work done; and therefore the defendant ought to have been let into his defence."

Lawrence, J. "In the case of *Broom* v. *Davis*, where there had been a specific sum agreed to be paid, there might be more reason for saying that such a defence would be a surprize upon the plaintiff; and there the rule laid down by Mr. Justice *Buller* may be a good one, if the plaintiff has had no notice of the kind of defence intended to be set up against his demand. But even there, if the plaintiff have previous notice that the defendant means to dispute the goodness or value of the work done, I think the defendant ought to be let into his defence: for, after all, considering the matter fairly, if the work stipulated for at a certain price were not properly executed, the plaintiff would not have done that which he engaged to do; the doing which would be the consideration of the defendant's promise to pay, and the foundation on which his claim to the price stipulated for would rest: and therefore, especially if he should have notice that the defendant resists payment on that ground, he ought to come prepared with proof that the work was executed properly. But where the plaintiff comes upon a *quantum meruit*, this defence can be no surprize upon him; because it is part of his case, and he must necessarily come prepared to show what the work was worth."

Le Blanc, J. "I think that in either case the plaintiff must be prepared to show that his work was properly done, if that be disputed, in order to prove that he is entitled to his reward; otherwise he has not performed that which he undertook to do, and the consideration fails. And I think it is competent to the defendant to enter into such a defence, as well where the agreement is to do the work for such a sum, as where it is general to do

do ſuch a work. If a man contracted with another to build him a houſe for a certain ſum, it ſurely would not be ſufficient for the plaintiff to ſhow that he had put together ſuch a quantity of brick and timber, in the ſhape of a houſe, if it could be ſhown that it fell down the next day: but he ought to be prepared to ſhow that he had done the ſtipulated work according to his contract; and it is open to the defendant to prove that it was executed in ſuch a manner as to be of no value at all to him, or not to be of the value claimed.

If a man promiſes to build a mill or houſe for another, within a certain time, if he fails, no action lies upon this promiſe, unleſs there be a conſideration alleged for the doing it, it being *nudum pactum*, or a promiſe without any conſideration. (*d*)

So, a count in a declaration ſtating, that the plaintiff retained the defendant, who was a carpenter, to repair a houſe before a given day; that the defendant accepted the retainer, but did not perform the work within the time, *per quod* the rooms of the plaintiff's houſe were damaged, cannot be ſupported. But a count ſtating that the plaintiff, being poſſeſſed of ſome old materials, retained the defendant to perform the carpenter's work on certain buildings of the plaintiff, and to uſe thoſe old materials; but that the defendant, inſtead of uſing them, made uſe of new ones, thereby increaſing the expence, is good.

Thus, in the caſe of *Elſee* and another *v. Gatward*, (*e*) which was an action upon the caſe. The firſt count in the declaration ſtated, that the plaintiffs, on the 29th of *Auguſt*, 1791, were about to build a warehouſe, &c. and to rebuild and repair certain parts of a dwelling-houſe and ſtables, &c. and were very deſirous of having the warehouſe completely tiled and covered in, and the front of the dwelling-houſe rebuilt, on or before the 1ſt of *November* then next; and alſo of having the bricklayer's and carpenter's works of the warehouſe completely finiſhed on or before the 1ſt of *December*; and the whole of the remaining repairs finiſhed on or before the 25th of *December* then next; and thereupon the plaintiffs, on the 29th of *Auguſt*, 1791, at the ſpecial inſtance and requeſt of the defendant, who was a builder, and had full notice of

(*d*) 1 *Rol. Abr. fo.* 9. *pl.* 1.
(*e*) 5 *Term. Rep.* 143. *See alſo* 1 *Rol. Abr.* 9. *pl.* 2. 3.

the

the premiſes, retained and employed the defendant to do and perform all and ſingular the bricklayer's and carpenter's works which ſhould be requiſite on the occaſion aforeſaid, within the ſeveral times therein before mentioned for the completion thereof reſpectively: and although the defendant afterwards accepted of ſuch retainer and employment upon the terms aforeſaid, and could and ought to have completed all ſuch bricklayer's and carpenter's works within the ſaid reſpective times, yet the defendant contriving to injure the plaintiffs, &c. did not, nor would completely tile or otherwiſe cover in the ſaid warehouſe, &c. on or before the ſaid 1ſt of *November*, nor did nor would finiſh the bricklayer's and carpenter's works of the warehouſe on or before the ſaid 1ſt day of *December*, and the whole of the remaining repairs on or before the ſaid 25th day of *December*, &c.; but, on the contrary thereof, permitted the ſaid warehouſe to continue untiled and uncovered, &c.; in conſequence of which ſaid neglect of the defendant, the walls of the ſaid premiſes were greatly ſapped and rotted, and the ceiling damaged and ſpoiled, and the plaintiffs were obliged to continue tenants of another warehouſe and ſtables, &c. and were thereby put to additional expence, &c. The ſecond count ſtated, that the plaintiffs, on the 29th of *Auguſt*, 1791, being poſſeſſed of divers old materials of buildings, retained and employed the defendant, at his ſpecial inſtance and requeſt, to do and perform certain bricklayer's and carpenter's work, upon divers buildings and premiſes of them, the plaintiffs, and to uſe and apply, in and about thoſe works, all ſuch parts of the old materials as were fit and proper for that purpoſe; and that, although divers parts of the ſaid old materials were fit and proper to have been uſed and applied in and about the ſaid works, yet the defendant, contriving to injure the plaintiffs in this behalf, and to enhance the expence of the bricklayer's and carpenter's works, did, nor would uſe and apply, in and about the ſaid works, ſuch parts of the old materials as were fit, &c. but refuſed ſo to do, and wrongfully and injuriouſly uſed and applied, in and about the ſame works, other new and expenſive materials, in the ſtead of ſuch old materials as were fit and proper for the ſame purpoſes; whereby the plaintiffs were put to an unneceſſary expence, &c., and the old materials became wholly uſeleſs, &c. There was alſo a third count in *trover* for the old materials.

The defendant demurred to the two firſt counts, alleging for cauſes, that, notwithſtanding the whole of the ſuppoſed cauſes of action

action in those counts were in the nature of a *nonfeazance*, and consisted in the non performance of certain matters and things in those counts mentioned as having been omitted to be done by the defendant, it was not stated in either of those counts, nor did it thereby appear that the defendant, by any promise, undertaking, contract or agreement was bound to the performance of those several matters or things, &c.; that although the several supposed causes of action in those counts were founded upon implied contracts in law, *no sufficient ground or consideration to raise or support such implied contracts was stated*; that there was not stated, nor did it appear in those counts that there was any promise or contract, on the part of the defendant, upon which the breaches in those counts could operate; and that those counts did not contain any cause of action against the defendant, &c.

The Court, after argument, determined that the first count of the declaration was bad, for want of consideration; but that the second count was good.

Lord *Kenyon*, Ch. J. said, "If this had been an action of *assumpsit*, it could not have been supported, for want of a consideration; it would have been *nudum pactum*: and if both the counts be not good, the defendant is entitled to judgment. Now I do not think that the first count in the declaration is good in law. It states that the defendant, who is a carpenter, was retained by the plaintiffs, to build and to repair certain houses; but it is not stated that he was to receive any consideration, or that he entered upon his work. No consideration results from his situation as a carpenter, nor from the undertaking; nor is he bound to perform all the work that is tendered to him: and therefore the amount of this is, that the defendant has merely told a falsehood, and has not performed his promise; but for his non-performance of it no action can be supported. This is warranted by Lord *Holt*'s opinion, in *Coggs* v. *Bernard*, (*f*) where, recognizing the case in 11 *Hen.* 4. 33. he said, "There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie." And on this opinion I think I may safely rely, especially as the justice of the case will not be altered by the form of the action; for if *assumpsit* will not lie in

(*f*) *Ld. Raym.* 919.

such

ſuch a caſe, there is no technical reaſoning that will ſupport ſuch an action as for a *tort*. In that caſe, *Powell*, J. ſaid, "An action will not lie for not doing the thing, for want of a ſufficient conſideration; but if the bailee will take the goods into his cuſtody, he ſhall be anſwerable for them; for the taking of the goods into his cuſtody is his own act. Lord *Holt* there put ſeveral caſes to eſtabliſh this poſition, which will reconcile the caſes now cited on the behalf of the plaintiffs. In *Brown* v. *Dixon*, (*g*) the defendant had received the dog into his poſſeſſion. This caſe is very diſtinguiſhable from thoſe of common carriers and porters, from whoſe ſituation certain duties reſult; they are bound by law to carry goods delivered to them, and are by law entitled to a recompence: but no ſuch duty reſults from the ſituation of a carpenter; he is not bound, as ſuch, to perform all the work that is brought him. It appears to me, therefore, that the firſt count cannot be ſupported, there being no conſideration expreſsly ſtated, nor any conſideration reſulting from the defendant's employment as a carpenter; though had the defendant performed the work, he might have recovered a ſatisfaction on a *quantum meruit*. Upon the authority of *Coggs* v. *Bernard*, and the caſes there noticed, not contradicted by any other deciſion, I think that the firſt count for nonfeazance is bad, but that the ſecond count may be ſupported. It is there ſtated, that the defendant entered upon his employment, and that he did not do that which he ought to have performed, according to his retainer. In that count it is ſtated, that he undertook to uſe the old materials; that in fact he did not uſe thoſe, but ſubſtituted new ones in their ſtead, thereby enhancing the expence to the plaintiffs. This comes within the caſe mentioned by Lord *Holt*, in *Coggs* v. *Bernard*, ſpeaking of the ſame caſe in the year's books; "but there the queſtion is put to the Court, what if he had built the houſe unſkilfully? and it was agreed in that caſe an action would have lain:" for though the defendant could not have been compelled to build this houſe, and to uſe the old materials, yet having entered upon the contract, he was bound to perform it; and not having performed it in the manner propoſed, an action lies againſt him."

Aſhhurſt, J. "The ſecond count may be maintained, inaſmuch as it appears that the defendant was retained by the plaintiffs; that he entered upon the work in conſequence of that retainer;

(*g*) 1 *Term Rep.* 274.

and that he did not perform it according to the terms of the retainer, by using new materials, instead of the old, which subjected the plaintiffs to a considerable expence. This amounts to a misfeazance on the part of the defendant, and may be the foundation of an action. But the first count cannot, I think, be supported. The distinction is this: if a party undertake to perform work, and proceed on the employment, he makes himself liable for any misfeazance in the course of that work: but if he undertake, and do not proceed on the work, no action will lie against him for the nonfeazance. In this case, the defendant's undertaking was merely voluntary, no consideration for it being stated. There was no custom of the realm, or any legal obligation to compel him to perform this work; and that distinguishes this case from those of a common carrier, porter, and ferryman, who are bound, from their situation in life, to perform the work tendered to them: but a carpenter, as such, is not bound by any such obligation. This count is merely for nonfeazance; and it does not state that the defendant entered upon the employment. It is, indeed, alleged, that he did not finish the work, from whence the plaintiff wishes the court to infer that he had begun it: but as that is the *gist* of the action, it should have been stated expressly. Nor is it a necessary inference to be drawn from the facts stated: for, consistently with every thing alleged, the defendant may not have begun the work at all. But it has been contended, that it was not necessary to allege that the defendant was employed to perform this work for hire and reward; it being stated that he was retained, and that *indebitatus assumpsit* would have lain by the defendant, if he had performed it. I admit that the defendant might have recovered a satisfaction in such an action, if he had executed the work; but, in order to compel him to perform it, it should appear that there was an express consideration for it: the word "retain," does not necessarily show that there was a consideration."

2. *By Surveyors.*]—A surveyor is to be paid according to his labour, and not according to the amount of the bills he looks over and settles.

Thus, in the case of *Upsdell* v. *Stewart*, (*b*) which was an action

(*b*) *Peake's Cas. N. P.* 153.

of *assumpsit* for work and labour, as a surveyor. The plaintiff demanded 34*l.* being 5*l. per cent.* on all money charged by and allowed to the different tradesmen. The defendant had paid one half of the sum demanded into court contending, that 2½ *per cent.* was a sufficient compensation for the business the plaintiff had done. He had done nothing more than measure the work, and settle the bills, not being at all employed in building the house. The counsel for the plaintiff offered to call witnesses to prove, that the uniform practice of surveyors was to charge 5*l. per cent.* on all money allowed to the workmen; and he instanced the case of surgeons and others, whose fees were settled by the evidence of professional men, as to the usual charge on such occasions.

But Lord *Kenyon*, Ch. J. said: "The plaintiff is entitled to a reasonable compensation for his labour, but he is not to estimate that by the money laid out by the defendant in finishing his building. I am bound to give my opinion on the matter of law, the jury will answer as to the matter of fact. I am enabled to state, from the record, what is the true question between the parties. The plaintiff states his demand to be "as much as he reasonably "deserves to have for his work and labour." Does he reasonably deserve to have this exorbitant demand? As to the custom offered to be proved, the course of robbery on *Bagshot Heath* might as well be proved in a court of justice. It ought not, nor cannot be supported."

3. *By Surgeons and Apothecaries.*] A surgeon or apothecary may maintain an action of *assumpsit* for labour and attendance, as well as for medicines and other necessary things administered. Though if a surgeon furnishes a bill to his patient, and leaves a blank for his charge for attendances; if the patient pays a certain sum on that account, the surgeon is bound by the sum so paid, he not having made any specific charge.

Thus, in the case of *Tuson* v. *Batting*, (*i*) which was an action of *assumpsit* brought by the plaintiff, who was a surgeon, for attending the defendant's wife: and the matter in dispute was the *quantum* of payment which was claimed by the plaintiff. The defendant lived out of town, and the attendances had been made

(*i*) 3 *Esp. Rep.* 192.

there:

there: the plaintiff claimed, as a cuſtomary charge, one guinea *per* mile for each attendance, in addition to his fee. By this mode of calculation the plaintiff's demand would have amounted to 200*l.*; but he had delivered a bill without a ſpecific charge, leaving a blank for the ſum he was to receive.

The defendant paid 70*l.* into court: this was taken out, and the plaintiff went for a further ſum.

Several ſurgeons were called by the plaintiff, who all proved, that it was cuſtomary and uſual for ſurgeons to make the charge of one guinea *per* mile where the attendance took place out of town.

Lord *Kenyon*, Ch. J., after obſerving that though profeſſional men were entitled to a fair and liberal compenſation for their aſſiſtance, ſaid: "There are, however, certain claims which they affect to ſet up, which, if unreaſonable or improper, it is the buſineſs of the jury to controul, and this appears to be one of them. It is has been ſaid, that ſurgeons and phyſicians were on the ſame footing; if it is ſo, it is of modern introduction. Dr. *Mead.* and Dr. *Conyers Middleton*, early in the century, were of a different opinion, hardly ranking ſurgeons as a liberal profeſſion; and conſidering phyſicians in a very different point of view. Surgeons bills have been the frequent ſubjects of actions. I remember an action brought by a Mr. *Sharp*, for attending a patient at *Hampſtead*. Mr. *John Hunter* was examined, and ſaid, when told the patient's complaint, "I cannot conceive why "the plaintiff went there ſo often." So that the neceſſity of thoſe frequent attendances may become matter of inquiry. But a phyſician can maintain no action for his fees; they are *quiddam honorarium*; for which no action is maintainable. In the preſent caſe the plaintiff delivered a bill, leaving a blank for his attendances. I am of opinion that is, conſidering his demand, in the light of *quiddam honorarium*, and leaving it to the generoſity of the perſon he attends; and that perſon having paid money into court to a certain amount, it is to be taken as the ſum which he conſiders as a fair renumeration for the plaintiff's ſervices, and which the plaintiff had left open in his bill; and that he cannot recover any more.

It appearing, however, afterwards, that the defendant had made an offer to pay at a certain rate, Lord *Kenyon* left it to the jury to ſay, whether the 70*l.*, paid into court, was not ſufficient

to satisfy the whole of the plaintiff's demand. The jury found that it was, and a verdict was entered for the defendant.

It has been held to be a good defence to an action by an apothecary for his bill of charges, that he treated his patient ignorantly and improperly.

Thus, in the case of *Kannen* v. *M'Mullen*, (*k*) which was an action of *assumpsit* for work and labour as a surgeon and apothecary, and medicines administered.

The plaintiff's case being proved, the defendant called Mr. *Cline* and Dr. *Letsom*, who said, that from the plaintiff's bill it appeared had been very improperly treated, as medicines perfectly inconsistent with each other had been administered. They confessed that disorders would sometimes take a sudden turn, and that they could not judge so well as they should have been able to do, had they attended the defendant.

Erskine, as counsel for the plaintiff, in his reply to the jury, contended that in this action a very different question was to be tried than in an action by the plaintiff against the surgeon for improper treatment. Lord *Mansfield*, he said, had held that in no case could the defendant make improper treatment a ground of defence, because the plaintiff could not have proper notice of that defence, and be prepared to answer it, as in an action against him; but Lord *Kenyon* had laid down a rule that where plain misconduct appeared, the plaintiff should not be permitted to recover any damages; but this must be a plain and certain misconduct, not one on which the minds of the jury could by possibility doubt.

Lord *Kenyon*, Ch. J. said: "In a case where the demand is compounded of skill and things administered, if the skill, which is a principal part, is wanting, the action fails, because the defendant has received no benefit. Many cases may be imagined where great mischief would happen were the law were otherwise. If a man is sent for to extract a thorn which might be pulled out with a pair of nippers, and through his misconduct it becomes necessary to amputate the limb, shall it be said, that he may come into a court of justice to recover fees for the cure of that wound which he himself has caused? I do not say that

(*k*) *Peake's Cas. N. P.* 59. *Sed vide ante* 361.

this

this caſe amounts to that put, but where ſhall the line be drawn? If the medicines applied had been given under the direction of a phyſician, however improper they may be, the action ſhould be ſupported, becauſe the ſkill would not in that caſe be the ground of the action." His lordſhip, after commenting upon the evidence, left it to the jury to conſider whether or not the plaintiff had miſconducted himſelf, for upon that muſt their verdict depend.

The jury, however, found for the plaintiff for the money charged for the medicines.

Indeed, if a ſurgeon or apothecary is employed to attend a perſon in illneſs, the law implies a promiſe or contract that he will uſe due diligence and ſkill in the diſcharge of his duty; if therefore he is guilty of any unſkilfulneſs or negligence in the treatment of the patient, he is liable to an action for damages; and the plaintiff may declare either in *caſe* for the *tort*, or in *aſſumpſit*.

Thus, in the caſe of *Slater* v. *Baker* and *Stapleton*, (*l*) which was an action of *aſſumpſit*, wherein the plaintiff declared, that the defendant *Baker*, being a ſurgeon, and *Stapleton* an apothecary, he employed them to cure his leg, which had been broken and ſet, and the callous of the fracture formed; that in conſideration of being paid for their ſkill, labour, &c., they undertook and promiſed, &c.; but the defendants not regarding their promiſe and undertaking, and the duty of their buſineſs and employment, ſo ignorantly and unſkilfully treated the plaintiff; that they ignorantly and unſkilfully broke and diſunited the callous of the plaintiff's leg after it was ſet, and the callous formed, whereby he is damaged. The defendants pleaded not guilty, whereupon iſſue was joined, which was tried before the Lord Chief Juſtice *Wilmot*, and a verdict found for the plaintiff, damages 500*l*. The ſubſtance of the evidence for the plaintiff, at the trial was, firſt, a ſurgeon was called, who ſwore, that the plaintiff having broken both the bones of one of his legs; this witneſs ſet the ſame; that the plaintiff was under his hands nine weeks; that in a month's time, after the leg was ſet, he found the leg was healing, and in a good way; the callous was formed; there was a little protuberance, but not more than uſual: Upon

(*l*) 2 *Wils.* 359.

croſs examination he ſaid, he was inſtructed in ſurgery by his father, that the callous was the uniting the bones, and that it was very dangerous to break or diſunite the callous after it was formed.

John Latham, an apothecary, ſwore he attended the plaintiff nine weeks, who was then well enough to go home; that the bones were well united; that he was preſent with the plaintiff and defendants, and at firſt the defendants ſaid the plaintiff had fallen into goods hands; the ſecond time he ſaw them altogether, the defendants ſaid the ſame; but when he ſaw them together a third time, there was ſome alteration; he ſaid, the plaintiff was then in a paſſion; and was unwilling to let the defendants do any thing to his leg; he ſaid, he had known ſuch a thing done as diſuniting the callous, but that had been only when a leg was ſet very crooked, but not where it was ſtraight.

A woman called as a witneſs, ſwore, that when the plaintiff came home he could walk with crutches; that the defendant, *Baker*, put on the plaintiff's leg an heavy ſteel thing that had teeth, and would ſtretch or lengthen the leg; that the defendants broke the leg again, and three or four months afterwards the plaintiff was ſtill very ill and bad of it.

The daughter of the plaintiff ſwore, that the defendant, *Stapleton*, was firſt ſent for to take off the bandage from the plaintiff's leg; when he came the defendant declined to do it himſelf, and deſired the other defendant, *Baker*, might be called in to aſſiſt; when *Baker* came he ſent for the machine that was mentioned; plaintiff offered to give *Baker* a guinea, but *Stapleton* adviſed him not to take it then, but ſaid they might be paid altogether when the buſineſs was done; that the third time the defendants came to the plaintiff, *Baker* took up the plaintiff's foot in both his hands, and nodded to *Stapleton*, and then *Stapleton* took the plaintiff's leg upon his knee, and the leg gave a crack, when the plaintiff cried out to them, and ſaid, "You have "broke what nature had formed;" *Baker* then ſaid, to the plaintiff, you muſt go through the operation of extenſion; and *Stapleton* ſaid, we have conſulted and done for the beſt.

Another ſurgeon was called, and ſwore, that in caſes of crooked legs, after they have been ſet, the way of making them ſtraight is by compreſſion, and not by extenſion, and ſaid, he had not the leaſt idea of the inſtrument ſpoken of for extenſion: he gave *Baker* a good character, as having been the firſt ſurgeon

of

of *St. Bartholomew's* hoſpital for twenty years, and ſaid he had never known a caſe where the callous had deoſified.

Another ſurgeon was called, who ſwore, that when the callous is formed to any degree, it is difficult to break it, and the callous, in this caſe, muſt have been formed, or it would not have given a crack; and ſaid, extenſion was improper; and if the patient himſelf had aſked him to do it, he would have declined it; and if the callous had not been hard, he would not have done it without the conſent of the plaintiff; that compreſſion was the proper way, and the inſtrument improper: he ſaid, the defendant, *Baker*, was eminent in his profeſſion. Another ſurgeon was called, who ſwore, that if the plaintiff was capable of bearing his foot on the ground, he would not have diſunited the callous if he had been deſired by him, but in no caſe whatever without the conſent of the patient: if the callous was looſe, it was proper to make the extenſion, to bring the leg into a right line. A ſervant of the plaintiff ſwore, the plaintiff had put his foot upon the ground three or four weeks before this was done.

The counſel for the defendants relied firſt, upon the good character of *Baker*, which was given by all the witneſſes; and as to *Stapleton*, they objected there was no evidence to affect him: but the Lord Chief Juſtice, thought there was ſuch evidence againſt both the defendants as ought to be left to the jury, as the nodding, the adviſing *Baker* not to take the guinea offered to him by the plaintiff; beſides, the apothecary firſt propoſed ſending for *Baker*: the plaintiff was in no pain before they extended his leg, and he only ſent to *Stapleton* to have the bandage taken off. The Lord Chief Juſtice aſked the jury whether they intended to find the damages againſt both the defendants? And they found 500*l.* againſt them jointly; and he ſaid he was well ſatisfied with the verdict.

It was, however, afterwards moved, that the verdict ought to be ſet aſide, becauſe firſt, the action was upon a joint contract, and there was no evidence of a joint undertaking by both the defendants: the plaintiff ſent for *Stapleton* to take off the bandage, who declined doing it, and ſaid, "I do not underſtand this "matter, you muſt ſend for a ſurgeon;" accordingly Mr. *Baker* was ſent for, who entered upon the buſineſs as a ſurgeon unconnected with *Stapleton*. 2dly, It was objected that the evidence given did not apply to this action, which was upon a joint contract: the evidence was, that the callous of the leg was broke

without the plaintiff's conſent; but there was no evidence of ignorance, or want of ſkill, and therefore the action ought to have been treſpaſs *vi et armis*, for breaking the plaintiff's leg without his conſent.

But the Court, without hearing the counſel on the other ſide, refuſed the rule, and gave judgment for the plaintiff. They ſaid: "It is objected firſt, that this is laid to be a joint undertaking, and therefore it ought to be proved, and we are of opinion that it ought: the queſtion therefore is, whether there is any evidence of a joint undertaking? We are of opinion there is; Mr. *Stapleton* declines acting alone, but in concurrence with Mr. *Baker*. This appears in evidence, and is ſufficient, for there is no occaſion to prove an expreſs joint contract, promiſe or undertaking. When an offer is made to *Baker* of a guinea, *Stapleton* ſays, you had better be paid all at laſt: they both attended plaintiff together every time, and *Stapleton* ſaid, we have conſulted and done for the beſt: when the plaintiff complained of what they had done, *Stapleton* conſidered himſelf as one of the perſons to join in the cure of the leg, for he put his hand on the knee when *Baker* nodded, and then the bone cracked; he is the original perſon aiding in this matter, and there is no ground for this objection. When we conſider the good character of *Baker*, we cannot well conceive why he acted in the manner he did; but many men, very ſkilful in their profeſſion, have frequently acted out of the common way, for the ſake of trying experiments. Several of the witneſſes proved, that the callous formed, and that it was proper to remove the plaintiff home; that he was free from pain, and able to walk with crutches. We cannot conceive what the nature of the inſtrument made uſe of is: why did *Baker* put it on when he ſaid, that plaintiff had fallen into good hands; and when the plaintiff only ſent for him to take off the bandage? It ſeems as if Mr. *Baker* wanted to try an experiment with this new inſtrument. 2dly, It is objected, that this was not the proper action, and that it ought to have been treſpaſs *vi et armis*. In anſwer to this, it appears, from the evidence of the ſurgeons, that it was improper to diſunite the callous without conſent; this is the uſage and law of ſurgeons; then it was ignorance and unſkilfulneſs, in that very particular, to do contrary to the rule of the profeſſion; what no ſurgeon ought to have done; and, indeed, it is reaſonable that a patient ſhould be told what is about to be done to him, that he may take courage,

courage, and put himſelf in ſuch a ſituation as to enable him to undergo the operation. It was alſo objected, this verdict and recovery cannot be pleaded in bar to an action of treſpaſs *vi et armis*, to be brought for the ſame damage; but we are clear of opinion it may be pleaded in bar. That the plaintiff ought to receive a ſatisfaction for the injury, ſeems to be admitted; but then it is ſaid, the defendants ought to have been charged as treſpaſſers *vi et armis*. The Court will not look with eagle's eyes to ſee whether the evidence applies exactly or not to the caſe, when they can ſee the plaintiff has obtained a verdict for ſuch damages as he deſerves, they will eſtabliſh ſuch verdict if it be poſſible. For any thing that appears to the court, this was the firſt experiment made with this new inſtrument; and if it was, it was a raſh action, and he who acts raſhly acts ignorantly: and although the defendants in general may be ſkilful in their reſpective profeſſions as any two gentlemen in *England*, yet the court cannot help ſaying, that in this particular caſe they have acted ignorantly and unſkilfully, contrary to the known rule and uſage of ſurgeons."

4. *By Phyſicians.*] A phyſician cannot maintain an action for his fees.

Thus, in the caſe of *Chorley* v. *Belcot*, (*m*) executor, which was an action of *aſſumpſit* for fees for attending for a conſiderable time on the defendant's teſtator, who lived at ſome little diſtance from the town of *Doncaſter*, where the plaintiff reſided; and the evidence was, that at *Doncaſter*, and its neighbourhood, there was no certain rule about fees, but the general practice was for a phyſician to receive two guineas a week for his attendance. At the trial, the plaintiff obtained a verdict. But a motion was afterwards made to ſet aſide this verdict and a rule *niſi* was obtained, on the ground that no action lay for a phyſician's fees any more than for a barriſter's.

Upon ſhowing cauſe againſt this rule it was obſerved, that though this point had been ruled ſeveral times at *niſi prius* againſt ſuch a claim, yet it had never been ſolemnly decided; nor was there any authority in the books for putting the claim of a phyſician's fees upon the ſame footing as thoſe of a barriſter. In the latter caſe it might originally have been proper that no temptation ſhould

(*m*) 4 *Term Rep.* 317.

be

be held out to countenance injuſtice: but in the former it would be equally impolitic, that thoſe who were frequently put to expence in attending patients at a diſtance, and who are liable to make reparation to thoſe who may ſuffer by their want of ſkill, ſhould not be certain of a juſt and honourable reward. The regulation with regard to barriſters, is founded on grounds of public policy, as appears by the paſſage in *Tacitus*, to which Mr. J. *Blackſtone* (*n*) refers; but they are totally inapplicable to the caſe of phyſicians. And in that very paſſage in *Tacitus* it is taken for granted that the latter were entitled to a remuneration, becauſe their ſituation was diſſimilar to that of advocates. Beſides, in this caſe, there is an additional reaſon why the plaintiff ſhould recover, as there is underſtood to be a general ſtipulated acknowledgement for a phyſician's attendance at the place where this tranſaction aroſe.

But the Court determined, that the action could not be maintained. And Lord *Kenyon*, Ch. J. ſaid: "I remember a learned controverſy ſome years ago as to what deſcription of perſons were intended by the *Medici* at *Rome*; and it ſeemed to have been clearly eſtabliſhed by Dr. *Mead*, that by thoſe, were not meant phyſicians, but an inferior degree amongſt the profeſſors of that art, ſuch as anſwer rather to the deſcription of ſurgeons amongſt us; but at all events it has been underſtood in this country that the fees of a phyſician are honorary, and not demandable of right. And it is much more for the credit and rank of that honourable body, and perhaps for their benefit alſo, that they ſhould be ſo conſidered. It never was yet heard of that it was neceſſary to take a receipt upon ſuch an occaſion. And I much doubt whether they themſelves would not altogether diſclaim ſuch a right as would place them upon a leſs reſpectable footing in ſociety than that which they at preſent hold."

5. *By Counſel.*] A counſel can maintain no action for his fees; for they are ſaid to be (*o*) given not as *locatio vel conductio*, but as *quiddam honorarium*; not as a ſalary or hire, but as a mere gratuity which a counſellor cannot demand without doing wrong to his reputation: as is alſo laid down with regard to advocates in the

(*n*) 3 *Bl. Com.* 289. (*o*) 3 *Bl. Com.* 28. 2 *Atk.* 332. *Sed vide* 2 *Leon.* 111. *Cro. Eliz.* 59.

civil

civil law, whoſe *honorarium* was directed by a decree of the ſenate not to exceed in any caſe ten thouſand *feſterces*, or about 80*l.* of Engliſh money. So no action will lie againſt a barriſter for negligently and unſkilfully ſettling a bill in chancery.*

6. *By Attornies and Solicitors.*] The remedy given by law to an attorney or ſolicitor for the recovery of his bill of coſts, is an action of *indebitatus aſſumpſit*. But by the Stat. 3. *Jac.* 1. *c.* 7. *ſ.* 1. it is enacted, "that all attornies and ſolicitors ſhall give a true "bill unto their maſters or clients, or their aſſigns, of all charges "concerning the ſuits which they have for them, ſubſcribed with "their hands and names, before ſuch time as they or any of them, "ſhall charge their clients, with any the ſame fees or charges." Upon this ſtatute it was decided to be a good plea, to an action brought by an attorney for his fees, that no bill had been delivered to the defendant, (*p*) or the ſtatute might have been given in evidence, on *non aſſumpſit*. (*q*) But if an attorney had delivered his bill to the defendant, after the arreſt and before the bill filed, it was well enough: (*r*) and this ſtatute did not extend to attornies in inferior courts, but only to thoſe in the courts at *Weſtminſter*. (*s*) It ſhould alſo ſeem, that an attorney's bill could not have been taxed unleſs an action was depending thereon, (*t*) nor without bringing the amount of it into court. (*u*)

To remedy theſe manifold inconveniences, it was enacted by the ſtatute 2. *Geo.* 2. *c.* 23. *ſ.* 23. (made perpetual by the 30. *Geo.* 2. *c.* 19. *ſ.* 75.) that "no attorney of the Court of *King's Bench*, *Common Pleas*, or *Exchequer*, &c. nor any ſolicitor in *Chancery*, &c. ſhall commence or maintain any action or ſuit, for the recovery of any fees, charges, or diſburſements, at law, or in equity until the expiration of one month or more, after ſuch attorney or ſolicitor reſpectively, ſhall have delivered unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their, dwelling houſe or laſt place of abode, (*v*) a bill of ſuch fees, charges, and diſburſements, (*w*) written in a common legible hand, and in the Engliſh tongue except law terms and names of writs, and in words at length, except times

* Fell *v.* Brown, *Peake's Cas. N. P.* 96, *et* vide ante 86.

(*p*) 3 *Keb.* 118 514. *T. Raym.* 245. 3 *Salk.* 19. *S. C. But ſee Carth* 57. 1 *Show.* 48. (*q*) 1 *Show* 338. *Bul. N. P.* 145. (*r*) 1 *Lil. P. R.* 145. *But ſee* 1 *Stra.* 633. (*s*) *Carth.* 147. 1 *Show.* 96. 1 *Salk.* 86. *S. C.* (*t*) 1 *Salk* 332. (*u*) 2 *Vez.* 451, 2. (*v*) Leaving it at the compting houſe is not ſufficient. 2 *Bos. & Pul.* 343. 4 *Eſp. Rep.* 254. (*w*) *Barnes*, 243. *Id.* 143.

and

and ſums; which bill ſhall be ſubſcribed with the proper hand of ſuch attorney or ſolicitor reſpectively."

"And upon application of the party or parties chargeable by ſuch bill, or of any other perſon in that behalf authorized, unto the Lord High *Chancellor*, or *Maſter of the Rolls*, or unto any of the courts aforeſaid, or unto a judge or baron of any of the ſaid courts reſpectively, in which the buſineſs contained in ſuch bill, or the greateſt part thereof in amount or value ſhall have been tranſacted; (*x*) and upon the ſubmiſſion of the ſaid party or parties, or ſuch other perſon authorized as aforeſaid, to pay the whole ſum, that upon taxation of the ſaid bill ſhall appear to be due, to the ſaid attorney or ſolicitor reſpectively; it ſhall and may be lawful for the ſaid Lord High *Chancellor*, *Maſter of the Rolls*, or any of the courts aforeſaid, or for any Judge or Baron, of any of the ſaid courts reſpectively, and they are hereby required, to refer the ſaid bill, and the ſaid attorney's or ſolicitor's demand, thereupon, although no action or ſuit ſhall be then depending in ſuch court, touching the ſame, to be taked and ſettled by the proper officer of ſuch court, without any money being brought into the ſaid court for that purpoſe: and if the ſaid attorney or ſolicitor, or the parties chargeable, by ſuch bill reſpectively, having due notice, ſhall refuſe or neglect to attend ſuch taxation, the ſaid officer may proceed to tax the ſaid bill *ex parte*; pending which reference and taxation, no action ſhall be commenced or proſecuted touching the ſaid demand."

"And upon the taxation and ſettlement of ſuch bill and demand, the ſaid party or parties ſhall forthwith pay to the ſaid attorney or ſolicitor reſpectively, or to any perſon by him authorized to receive the ſame, that ſhall be preſent at the ſaid taxation or otherwiſe unto ſuch other perſon or perſons, or in ſuch manner, as the reſpective courts aforeſaid ſhall direct, the whole ſum that ſhall be found to be or remain due thereon: which payment ſhall be a full diſcharge of the ſaid bill and demand, and in default thereof, the ſaid party or parties ſhall be liable to an attachment or proceſs of contempt, or to ſuch other proceedings, at the election of the ſaid attorney or ſolicitor, as ſuch party or parties was or were before liable unto."

"And if upon the ſaid taxation and ſettlement, it ſhall be found that ſuch attorney or ſolicitor, ſhall happen to have been overpaid,

(*x*) 1 *Salk.* 89. *But ſee* 2 *Barnard* 182. *Barnes* 122.

then the ſaid attorney or ſolicitor reſpectively, ſhall forthwith refund, and pay unto the party or parties entitled thereunto, or to any perſon by him, her, or them, authorized to receive the ſame, if preſent at the ſettling thereof, or otherwiſe unto ſuch other perſon or perſons, or in ſuch manner, as the reſpective courts aforeſaid ſhall direct, all ſuch money as the ſaid officer ſhall certify to have been ſo overpaid; and in default thereof, the ſaid attorney or ſolicitor reſpectively ſhall in like manner be liable to an attachment or proceſs of contempt, or to ſuch other proceedings, at the election of the ſaid party or parties, as he would have been ſubject unto if that act had not been made."

"And the ſaid reſpective courts are thereby authoriſed, to award the coſts of ſuch taxations to be paid by the parties according to the event of the taxation of the bill; that is to ſay, if the bill taxed be leſs, by a ſixth part, than the bill delivered, then the attorney or ſolicitor, is to pay the coſts of the taxation; but if it ſhall not be leſs, the court, in their diſcretion, ſhall charge the attorney or client, in regard to the reaſonableneſs or unreaſonableneſs of ſuch bill."

But by the 12 *Geo.* 2. *c.* 13. *ſ.* 5. it is enacted, "that it ſhall and may be lawful to and for every attorney, clerk in court, and ſolicitor to write his bill of fees, charges, diſburſements, with ſuch abbreviations as are now commonly uſed in the *Engliſh* language, any thing in any former law to the contrary notwithſtanding." And by *ſ.* 6. "the ſaid act of the ſecond year of His preſent Majeſty, for the better regulation of attornies and ſolicitors, or any clauſe, matter, or thing therein contained, ſhall not extend to any bill of fees, charges, and diſburſements, due from any attorney or ſolicitor, to any other attorney or ſolicitor, or clerk in court, but every ſuch attorney, ſolicitor, or clerk in court may uſe ſuch remedies, for the recovery of his fees, charges, and diſburſements, againſt ſuch other attorney or ſolicitor, as he might have done before the making of the ſaid act."

Upon the latter clauſe, there is a caſe in the reports, (*y*) where a judge of the Court of *King's Bench* having made an order, to refer an agent's bill to be taxed, and the maſter not having obeyed it, the court was applied to, and held that the order was irregular; the maſter declaring, that he had never taxed a bill for agency. But it is now the uniform practice of both courts, (*z*) to refer an

(*y*) 1 *Wilſ* 266. (*z*) *Doug.* 190, 200. and the caſes there cited in notis, Groom *v.* Symonds, *MSS Tidd Prac.* 281. 3*d. Ed.*

agent's

agent's bill to be taxed, upon the defendant's bringing into court the ſum claimed by the plaintiff. It is not neceſſary however that ſuch a bill ſhould be ſigned or delivered, before the commencement of an action. (*a*) And where buſineſs has been done by an an attorney for a client who afterwards becomes himſelf an attorney, the former need not deliver a bill ſigned, in order to recover his coſts. (*b*)

If the whole bill be for conveyancing, it cannot be taxed. (*c*) But if any part of an attorney's bill be for buſineſs done in court, the bill muſt be delivered a month before the action is brought, otherwiſe the plaintiff cannot recover. (*d*) And where an attorney had delivered two ſeparate bills, one of which was for fees and diſburſements in cauſes, and the other for making conveyances, a rule was made for taxing both. (*e*) And ſo, where it was moved that the maſter might be directed to tax thoſe articles in an attorney's bill, which related to conveyancing and parliamentary buſineſs, the reſt being for management of cauſes in the Court of *King's Bench*, Lord *Mansfield* ſaid, there was no doubt but the maſter might tax the whole; that he recollected a caſe, where the fees paid to a proctor for buſineſs done in the *Eccleſiaſtical Court*, made part of the bill; and it was determined, that as the whole bill had been referred to the maſter, he might tax that part of it. (*f*) The court will refer an attorney's bill to be taxed, though all the buſineſs was done at the quarter ſeſſions; (*g*) and in ſuch caſe an action cannot be maintained, for the amount of the bill, unleſs it be ſigned and delivered a month before the bringing of the action. (*h*)

Where it is neceſſary to deliver a bill of coſts, it muſt be left with the client, and not taken back again. (*i*) But it is not neceſſary for the executor or adminiſtrator of an attorney to deliver a bill of coſts, for buſineſs done by his teſtator or inteſtate, before the commencement of an action; (*k*) the ſtatute 2 *Geo.* 2. *c.* 23. *ſ.* 23. being confined to actions brought by the attorney himſelf

(*a*) *Doug.* 199. in notis. *Peake's cas. N. P.* 1, 2. 1 *Eſp. Rep.* 221
(*b*) 1 *Eſp. Rep.* 420. (*c*) *Tidd's Prac.* 281. (*d*) 6 *Term. Rep.* 645. *and ſee Peake's cas. N. P.* 102. 3 *Eſp. Rep.* 149. 2 *Bos. & Pul* 343. (*e*) *Say. Rep.* 233. *Tidd. Prac.* 282.
(*f*) *Doug.* 199. in notis. (*g*) 4 *Term Rep.* 496. *But ſee Id.* 124.
(*h*) 5 *Term Rep.* 694. 1 *Eſp. Rep.* 137. *S. C.* (*i*) 1 *H. Bl.* 290.
(*k*) 1 *Barnard, K B.* 433. *Andr.* 276. *Caſ. Pr. C. B* 52.

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and not extending to his perſonal repreſentatives. And in the court of *Common Pleas*, they will not ſuffer ſuch bill to be taxed: (*l*) but in the court of *King's Bench* it is otherwiſe; (*m*) for there, the bill may be referred to be taxed, on the defendant's undertaking to pay what is due.

An attorney delivered his bill, and after his death application was made to tax it, and above a ſixth part was taken off, it was moved that the executrix might pay the coſts, but the court held ſhe could not; for the words of the act, 2 *Geo.* 2. *c.* 23. *ſ.* 23. impoſe them upon the attorney, or ſolicitor only, and the executrix, is not to blame, if ſhe ſtand upon his bill, or make out one from his books. (*n*)

Before an attorney's bill has been ſettled and paid, it may be taxed as a matter of courſe, at any diſtance of time. (*o*) But after it has been ſettled and paid, and the payment has been long acquieſced under, the court will not refer it to be taxed as a matter of courſe. (*p*) So where a bond had been given for the debt five years before, and the vouchers had been delivered up, the court would not refer the bill to be taxed; ſaying an attorney at this rate could never be ſafe. (*q*) And it is a general rule that an attorney's bill cannot be taxed at the trial of an action brought upon it, nor after verdict; (*r*) for if the buſineſs was really done (which muſt be proved at the trial,) the delay of the defendant for more than a month, in objecting to the *quantum*, is an admiſſion that he thinks it to be reaſonable. But though an attorney's bill has been ſettled and paid, yet the court under ſpecial circumſtances, will refer it to be taxed; for the client may by affidavit ſhew that the buſineſs charged was never performed, or that the charges are fraudulent: and where that is the caſe, neither payment, or a releaſe, nor a judgment for the money due, will preclude the court from having the bill taxed. (*s*) It may alſo be taxed, though there was a ſpecial agreement, between the attorney and his client; that the former ſhould be paid for his time, at a certain rate by the day, beſides his expences; (*t*) or though

(*l*) *Parnes* 119, 122. (*m*) 1 *Salk.* 89. 2 *Stra.* 1056. *Say Coſts*, 324, 5.
(*n*) 2 *Stra.* 1056. *Say. Coſts*. 327. (*o*) *Tidd's Prac.* 283.
(*p*) *Ibid. Doug.* 199. (*q*) *Caſ. Pr. C. B.* 109. *Pr. Reg* 37. *S. C. But ſee* 1. *Barnard* 144, 5. (*r*) *Doug* 199. *Tidd's Prac.* 284.
(*s*) *Tidd's Prac* 283. (*t*) *Say. Coſts* 321. 2 *Barnard K. B.* 164. contra.

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he has obtained a warrant of attorney from his client, for confeſſing judgment for the money due upon his bill, and has entered up judgment thereupon. (*u*)

The ſtatute 2 *Geo.* 2. *c.* 23. *ſ.* 23. only requires the delivery of a bill, for the bringing of an action, and therefore though an attorney cannot bring an action on his bill, till it has been delivered a month, that circumſtance is not neceſſary to enable him to ſet it off. But he muſt not produce it at the trial by ſurprize: it is ſufficient in ſuch caſe, to deliver the bill time enough for the plaintiff to have it taxed before the trial. (*x*) The delivery of a former bill, is concluſive evidence againſt an increaſe of charge in a ſubſequent bill, on any of the items contained in it, and ſtrong preſumptive evidence againſt any additional items; but if there were any real errors or omiſſions in the former bill, they may be rectified. (*y*)

Negligence of an attorney in the conduct of a cauſe, cannot be ſet up as a defence to an action on his bill of coſts in that cauſe. (*z*)

Though, if an attorney be retained to proſecute or defend an action or perform any other profeſſional buſineſs, the law implies a contract or promiſe on his part that he will uſe due diligence, ſkill, and attention; and if he is guilty of any groſs negligence or conducts his buſineſs ignorantly and unſkilfully, he is liable to an action of *aſſumpſit* for any damage his client may ſuſtain in conſequence thereof.

Thus, in the caſe of *Ruſſel* v. *Palmer*, (*a*) which was an action of *aſſumpſit* againſt the defendant he being an attorney, and retained by the plaintiff to proſecute an action at his ſuit againſt *John Stewart* in the court of *King's Bench*, for not charging the latter in execution in due time according to the rules and practice of that court.

The cauſe was firſt tried before Lord *Camden*, when a verdict was given for the plaintiff for 3000*l.* the whole debt, by his lordſhip's direction; but afterwards a new trial was granted, his lordſhip and the court being of opinion that he had miſdirected the jury, in telling them they ought to find a verdict for the whole debt: whereas this action founds merely in damages, and

(*u*) *Say Coſts* 322. (*x*) *Doug.* 199. *in notis.* 1 *Eſp. Rep.* 499. *S. P.*
(*y*) 1 *Bos. & Pul.* 49. (*z*) Templer v. M'Lachlan, 2 *New Rep.* 136. (*a*) 2 *Wiſ.* 325.

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the jury ought to have been left at liberty to find what damages they thought fit. But upon the ſecond trial, the jury were told they might find what damages they pleaſed, and accordingly only found 500*l.* as it appeared to them in evidence, that *Stewart* was not totally inſolvent; and againſt this latter verdict the counſel for the defendant moved for a new trial upon the ground that the defendant had not been guilty of any negligence, but only an error in judgment in the conſtruction of a doubtful point of practice: for the rule of court of *King's Bench* made in *Trinity* term in the 2d year of *Geo.* 1. touching this matter, is in very doubtful words, viz. "If any plaintiff ſhall obtain judgment in the court "here in any action againſt any defendant a priſoner, and "ſhall not charge the ſaid defendant, ſo in priſon remaining, in "execution, upon the judgment ſo obtained, within two terms next "after ſuch judgment ſo had and obtained, then ſuch defendant, "ſo in priſon remaining ſhall have leave to file common bail, or "to ſue out a writ of *ſuperſedeas* for his diſcharge out of cuſtody;" that from the words of this rule it ſeems as if the plaintiff had two terms next after, and excluſive of the term wherein judgment was obtained againſt the priſoner; to charge him in execution; and therefore it was moved in behalf of the defendant that judgment might be ſtayed; for two reaſons; firſt, becauſe if the defendant *Palmer* had two terms excluſive of the term wherein judgment was obtained againſt *Stewart*, and wherein he rendered himſelf to priſon, to charge *Stewart* in execution, then this action is miſconceived; and 2dly, although the meaning and conſtruction of the ſaid rule be, that Mr. *Palmer* ought to have cauſed *Stewart* to be charged in execution, the very next term after the term wherein judgment was obtained againſt *Stewart*, and wherein he rendered himſelf, yet the words of the rule are ſo doubtful that it can be only conſidered as an error in judgment in Mr. *Palmer*, and not a negligence in the duty of his office as an attorney. Upon ſhowing cauſe, the lord chief juſtice *Wilmot* reported that ſeveral eminent practiſers were examined upon the trial as to the conſtruction and practice upon the ſaid rule, who ſaid, that of late years it was well underſtood, that a perſon ſurrendering in diſcharge of his bail after judgment muſt be charged in execution the very next term after ſuch ſurrender: ſome of them ſaid they believed this was not univerſally known by the city attornies, and that they thought that it was an omiſſion in Mr. *Palmer*, proceeding from want of judgment, and not from any wilful negligence

in regard to his client Mr. *Ruſſel*. *John Lambert*, Mr. *Palmer*'s clerk, ſwore, that in all the time he had ſerved Mr. *Palmer* they never had one render after judgment; that the friends of Mr. *Stewart*, while he was a priſoner, were in treaty about an accommodation with Mr. *Ruſſell*, in order to get *Stewart* diſcharged, that he, *Lambert*, before the end of *Trinity* term, in the fifth year of the King, propoſed to his maſter, *Palmer*, to charge the priſoner *Stewart* in execution, at the ſuit of the plaintiff *Ruſſell*; but Mr. *Palmer* then informed him, (this witneſs,) that the ſaid parties were in a treaty for an accommodation, and that he believed the matter would be ended; that upon a ſummons, before Lord *Mansfield*, to ſhow cauſe why *Stewart* ſhould not be diſcharged by ſuperſedeas, Lord *Mansfield* thought the ſaid rule did not extend to this caſe; another eminent practiſer was called for the defendant, and ſaid, that upon a ſummons before Mr. Juſtice *Foſter* in 1753, upon this very point of practice, that the judge, the plaintiff, had two terms to charge a priſoner in execution, excluſive of the term wherein the judgment was obtained againſt the priſoner, and wherein he ſurrendered himſelf.

Sed per curiam: "We are all of opinion, that this action is well conceived, and lies againſt Mr. *Palmer* for negligence; and we have authority to ſay, that Lord *Camden* is of the ſame opinion." Judgment was accordingly given for the plaintiff.

In the caſe of *Pitt* v. *Yalden*, (*b*) which was an application to the Court of *King's Bench* againſt an attorney for negligence for not declaring againſt a defendant in due time. Lord *Mansfield* ſaid: "That part of the profeſſion which is carried on by attornies is liberal and reputable, as well as uſeful to the public, when they conduct themſelves with honour and integrity: and they ought to be protected where they act to the beſt of their knowledge. But every man is liable to error: and I ſhould be very ſorry that it ſhould be taken for granted, that an attorney is anſwerable for every error or miſtake, and to be puniſhed for it, by being charged with the debt which he was employed to recover for his client from the perſon who ſtands indebted to him.

(*b*) 4 *Burr.* 2060.

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" A counſel may miſtake as well as an attorney. Yet no one will ſay, that a counſel, who has been miſtaken, ſhall be charged with the debt. The counſel, indeed, is honorary in his advice, and does not demand a fee: the attorney may demand a compenſation. But neither of them ought to be charged with the debt for a miſtake. Not only counſel, but judges may differ or doubt, or take time to conſider. Therefore an attorney ought not to be liable, in caſes of reaſonable doubt. I own I was alarmed at the verdict againſt *Palmer*. That caſe was before me at chambers; where it was inſiſted that the reaſon of not charging the defendant in execution, was upon account of a compromiſe depending. I referred them to the court; and the court thought there was no compromiſe depending. They had no doubt upon the conſtruction of the rule."

His lordſhip added, (*c*) " That Lord Chief Juſtice *Wilmot* told him, that at the ſetting out of the cauſe againſt *Palmer*, he thought it very hard, and not at all reaſonable, that an attorney ſhould be made anſwerable for the debt, upon account of a mere involuntary undeſigned miſtake in a nice point of practice; but afterwards upon the examination of Mr. *Palmer*'s clerk, it appeared that Mr. *Palmer* ſhowed him a memorandum relating to a compromiſe between the parties, but the clerk told him, " That " he muſt nevertheleſs charge the defendant, within two " terms." Mr. *Palmer*, however, did not charge him within the two terms: and the hope or apprehenſion of a compromiſe was pretended to have been the cauſe of not doing ſo, (and it appeared in this court too, that *Palmer* urged the apprehenſion of a compromiſe as an excuſe for his delaying to charge the defendant in execution.) But Lord Chief Juſtice *Wilmot* ſaid, it appeared upon the evidence, in the latter part of the courſe of the cauſe, which was tried before him, that the attorney for the plaintiff had offered to Mr. *Palmer*, that if he would declare upon his honour, " That the hope or apprehenſion of a compro- " miſe was really the true cauſe of his neglecting to charge the " defendant within time," the plaintiff would be ſatisfied with ſuch declaration upon his word and honour. This *Palmer* declined. He could not, (as it muſt be ſuppoſed, from his reject-

(*c*) *Page* 2063.

miſe,) make ſuch a declaration, conſiſtently with our. This circumſtance changed the opinion of Juſtice *Wilmot*, which before this evidence was given, our of *Palmer*, as not being liable. And thereupon he the jury upon the foot of a culpable negligence; what I *lata culpa* or *craſſa negligentia.*"

7. *By Proctors.*] Fees payable to proctors, and other officers of ſpiritual or eccleſiaſtical courts, in reſpect of buſineſs done by them in thoſe courts, are recoverable at common law by action of *indebitatus aſſumpſit* or *quantum meruit*, and not by ſuit in the ſpiritual courts. The queſtion, however, has been much litigated, and there are reſolutions both ways: but the better opinion ſeems to be that fees cannot be ſued for in a ſpiritual court. (*d*)

8. *By Commiſſioners to examine Witneſſes.*] If one be named a commiſſioner to examine witneſſes in a cauſe depending in *Chancery* or *Exchequer*, who officiates accordingly, he may bring an action of *aſſumpſit* for his labour and pains; for though he is to be conſidered as an officer of the court, yet he is not compellable to attend againſt his will, nor does the truſt repoſed in him make his taking a reward bribery, for the party is to take care to name ſuch as will ſerve, and it is but reaſonable it ſhould be at the charge of him for whom he officiates. (*e*)

9. *By an Arbitrator.*] No action will lie for buſineſs done as an arbitrator, unleſs there be an expreſs promiſe to pay him a ſum of money for his trouble.

Thus, in the caſe of *Virany*, executor, v. *Warne* (*f*) which was an action of *aſſumpſit* for work and labour by the plaintiff's teſtator in his life-time. The plaintiff's counſel, in ſtating the caſe to the jury, ſaid, that the action was brought to recover a

(*d*) *Vide* Horton v. Wilſon, 1 *Mod.* 167. *Johnſon* v. Oxenden, 4 *Mod.* 254. Johnſon v. Lee, 5 *Mod* 238. *Com. Rep.* 18. *Gibs. Cod.* 1015. *S.C.* Clerk v. Lee, 10 *Mod.* 261. Pollard v. Gerard, *Ld. Ray.* 703. Pearſon v. Campion, *Doug.* 620.

(*e*) Stokeld v Collingſon, *Carth.* 228. *Comb.* 186.

(*f*) 4 *Eſp. Rep.* 47.

ſum

ſum of money due to the teſtator, for acting as an arbitrator on the part of the defendant, in a diſpute which he had had with his partner.

Lord *Kenyon*, Ch. J. interrupted him by ſaying, that he conceived the action was not maintainable: that the appointment of an arbitrator, was not of ſuch a nature as to raiſe a demand for payment: and that he ſhould tell the jury that his opinion was, that the plaintiff was not entitled to recover any thing, unleſs ſhe could prove an expreſs promiſe. The plaintiff was therefore nonſuited.

In the caſe of *Hardreſs* v. *Prowd*, (*g*) where the declaration ſtated, that *whereas the plaintiff, at the inſtance and requeſt of the defendant, had taken pains to reconcile differences betwixt the defendant and* J. S. *and others, the defendant promiſed to pay to the plaintiff* 100*l.* at a certain day: and for this ſum the action was brought. It was objected, that this was no more than a voluntary curteſey: But *Glyn*, Ch. J. held *e contra*; for this was undertaken at the inſtance of the defendant, and here was a continued conſideration, though the pains taken were paſt; and judgment is ſaid to have been given *niſi*, &c.

10. *By Clergymen.*] An agreement with a vicar to pay him ſo much *per annum* for preaching is good. (*h*)

So, (*i*) if a rector give a perſon a *title* to the biſhop by which he appoints him curate of his pariſh church, and undertakes to continue him, and pay him a ſalary, "till he ſhall be otherwiſe "provided of ſome eccleſiaſtical preferment, or for fault by him "committed, lawfully removed," the rector cannot remove him without cauſe while he continues rector of that pariſh; and the curate may recover his ſtipend from the rector by action of *aſſumpſit* upon the title. But if the rector is *bonâ fide* preferred to another living, the obligation ceaſes. A readerſhip is not an eccleſiaſtial preferment within the meaning of ſuch a title.

11. *By Performers on the Stage.*] An action will not lie for the breach of an agreement "to dance at the *King's Theatre* in

(*g*) *Sty.* 465. (*h*) Taylor v. Gay, 1 *Sid.* 409. 2 *Keb.* 477. *S. C.*
(*i*) Martin v. Hind, *Doug.* 141. *Cowp.* 437.

the *Hay-market*, or at ſuch other place as the plaintiff ſhould appoint," if it appear that no licenſe for that theatre was granted by the *Lord Chamberlain*, as required by the 10 *Geo.* 2. *c.* 28., and that the plaintiff did not requeſt the defendant to dance at any other place which was licenſed.

Thus, in the caſe of *Gallini* v. *Laborie*, (*k*) which was an action of *aſſumpſit* upon a contract by which the defendant, a foreigner, undertook to come over to *England* in order to dance ballets at the *Italian* opera in the *Hay-market*, called the *King's Theatre*, or at ſuch other place as the plaintiff ſhould appoint. The defendant never came at all. But it appeared that during the time for which the defendant had engaged, there had been no licenſe from the *Lord Chamberlain* for the *Opera Houſe*, though the plaintiff's company had exhibited dancing entertainments there, but the plaintiff had a licenſe for performing muſical entertainments at a houſe in *Hanover Square*. No requeſt, however, was made to the defendant to perform there; nor did it appear that he had any notice that the plaintiff had ſuch a licenſe. A verdict, however, was given for the plaintiff: But a motion was afterwards made to the court of *King's Bench* for a rule to ſet aſide this verdict, on the ground, that inaſmuch as the plaintiff had not obtained a licenſe from the *Lord Chamberlain* to perform entertainments of the ſtage, the defendant could not be bound by a contract which was contrary to the policy of the 10 *Geo.* 2. *c.* 28., and under which he would have been ſubject to heavy penalties and puniſhments for exhibiting without ſuch licenſe. If, however, the dancers at the *Opera Houſe* were not conſidered to come within that ſtatute, then they fell within the prohibitions of 25 *Geo.* 2. *c.* 36. *ſ.* 2. which enacts, "That "every place, &c. kept for public dancing, &c., in *London* and "*Weſtminſter*, &c. without a licenſe from the quarter ſeſſion, ſhall be deemed a diſorderly place," and perſons found therein may be puniſhed. And further, that the circumſtance of the plaintiff having another houſe licenſed for different purpoſes, could not avail as the defendant had no notice of any other place than the *Opera Houſe* communicated to him. Againſt this rule it was contended, by the counſel for the plaintiff, that as the contract was for dancing only, it did not fall within the meaning of the 10 *Geo.* 2., which prohibits "acting, repreſent-

(*k*) 5 *Term Rep.* 242.

"ing

" ing and performing for hire, gain or reward of any interlude, " tragedy, comedy, opera, play, farce, or other entertainments " of the ſtage," without letters patent from the King, or licenſe from the *Lord Chamberlain*. All theſe terms, they contended, muſt, be confined to written performances, or ſuch as were capable of being reduced to writing; becauſe by the 3d ſection, where the ſame words are uſed, it is required, " That a true " copy thereof ſhall be ſent to the *Lord Chamberlain*, fourteen " days, at leaſt, before the acting, repreſenting or performing " thereof." Now that condition cannot apply to ſuch an entertainment as the preſent; for there can be no true copy of a dance. The contract does not even ſpecify any particular ſort of dance, which might, perhaps, have been deſcribed, however, inaccurately; but it is for dancing generally. Beſides the contract was not confined to dancing at the *Opera Houſe*, but it was to be at any place where the plaintiff choſe; and the defendant never gave him the opportunity of chooſing any other place which was licenſed, becauſe he never came at all, or proffered himſelf to the plaintiff. Other perſons, with whom the plaintiff alſo contracted in the like manner, have recovered againſt him the amount of their ſalaries, and no ſuch objection was allowed to avail the plaintiff. As to the ſtatute of the 25 *Geo.* 2. *c.* 36. it does not apply to this caſe; for the 4th ſection expreſsly provides that the act ſhall not extend to the Theatres Royal in *Drury-Lane* or *Covent-Garden*, or the theatre commonly called the *King's Theatre* in the *Hay-market*.

But Lord *Kenyon*, Ch. J. ſaid, " I think the ſtatute of the 10 *Geo.* 2. does extend to this and every other ſpecies of ſtage enterrainment. The words are general; and the intent of the legiſlature manifeſtly was to put all places of public diverſion under the control of the magiſtracy. The clauſe requiring a copy of the entertainment to be previouſly given to the *Lord Chamberlain*, of courſe can only apply to ſuch entertainments as are recited from written performances; and was intended as an additional check againſt a licentious uſe of the ſtage. Poſſibly the notion of the ſtatutes being confined to ſuch productions may have ariſen from the occaſion which is ſuppoſed to have given birth to it; and which was ſome plays written by Mr. *Gay* and others, levelled againſt the exiſting adminiſtration, with intention of bringing it into diſrepute with the people. The ſubſequent ſtatute of 25 *Geo.* 2. puts all ſorts of places, opened for public diverſion under the di-

rection and appointment of the magiſtrates at large; and is applicable to other entainments than thoſe of the ſtage. The exception in the 4th clauſe that the act ſhall not extend to the *Hay-market*, and the other two Royal Theatres was inſerted on a ſuppoſition that they would be licenſed by the *Lord Chamberlain*; for the proviſo goes on to ſay, "Nor to ſuch performances and "public entertainments, as ſhall be carried on by virtue of "letters patent, or licenſe of the crown, or the *Lord Cham-* "*berlain.*" But the legiſlature evidently did not mean to except theſe three places, unleſs they were licenſed. Under the former act no entertainment of the ſtage, of which dancing is one, can be exhibited without the *Lord Chamberlain*'s licenſe; and none having been obtained in this caſe, the plaintiff cannot call upon the defendant for the breach of an agreement which, without ſuch licenſe, it was unlawful for him to execute. As to the circumſtance of other performers having recovered on ſimilar agreements againſt the plaintiff for their ſalaries; thoſe verdicts are right, for being engaged to the plaintiff, and ready to execute the agreement on their part, they ought not to ſuffer becauſe he did not obtain a licenſe, which it was his buſineſs to have procured."

Aſhhurſt, J. ſaid: "The legiſlature did not mean by the ſtatute 25 *Geo.* 2. to give any magic virtue to the walls of the *Opera Houſe* in the *Hay-market*, but merely that that place, which was ſuppoſed to be licenſed by the *Lord Chamberlain*, need not have any licenſe from the other magiſtrates. But that clauſe cannot extend to the *Opera Houſe*, unleſs it be ſo licenſed."

Buller, J. "As to the argument drawn from the words of the agreement, that the defendant was bound to dance at any other place beſide the *Hay-market* theatre which the plaintiff ſhould appoint; it muſt be obſerved, that all the evidence points to that place alone. If the plaintiff had wiſhed the defendant to dance elſewhere, he ought to have given him notice of it: but the only place ſpecifically mentioned in the agreement is the *Hay-market theatre*, and it does not appear, that the plaintiff required the defendant to dance in any other place."

12. *By Proprietors of Stage-coaches and Poſt-chaiſes to carry Paſſengers, &c.*] A perſon paying the whole fare of a ſtage-coach, may take his place therein at any ſtage of the journey; but not ſo if he makes a depoſit of half the fare only.

Thus,

Thus, in the caſe of *Ker* v. *Mountain*, (*l*) which was an action againſt the defendant as proprietor of a ſtage-coach, it was ruled by Lord *Kenyon*, that if a perſon takes a place in a ſtage-coach, and pays at the time only a depoſit as half the fare for example, and is not at the inn ready to take his place when the coach is ſetting off, that the proprietor of the coach is at liberty to fill up his place with another paſſenger; but if at the time of taking his place, he pays the whole of the fare, in ſuch caſe the proprietor cannot diſpoſe of his place, but he may take it at any ſtage of the journey he thinks fit.

The proprietors of a mail-coach are anſwerable for any injury happenning to a paſſenger through the miſconduct of their driver.

Thus, in the caſe of *White* v. *Boulton* and others, (*m*) which was an action againſt the defendants, who were proprietors of the *Cheſter* mail-coach, for the negligence of the driver, by reaſon whereof the coach was overturned, and the plaintiffs arm broken. The action was in *aſſumpſit*; the declaration ſtated, that the defendants were proprietors of the coach, and that in conſideration the plaintiff had paid them three guineas for his carriage, they undertook to carry him ſafely.

The counſel for the defendant ſubmitted that the proprietors of a mail-coach were not anſwerable for the negligence of their ſervants; for that thoſe coaches were not under the government of the proprietors, but the concern of the public being eſtabliſhed merely for the conveyance of letters; and therefore if any perſon travelled in them he went at his own riſk, and the law implied no promiſe for his ſafety.

But Lord *Kenyon*, Ch. J. ſaid: "That when theſe coaches carried *paſſengers*, the proprietors of them were bound to carry them ſafely and properly." The plaintiff accordingly obtained a verdict.

If a perſon hire a poſt-chaiſe, and is permitted to go into it, and to put on his luggage, the poſt-maſter muſt proceed on the journey, if his fare is tendered to him.

Thus, in the caſe of *Maſſiter* v. *Cooper*, (*n*) which was an action of *aſſumpſit*. The declaration ſtated, that in conſideration

(*l*) 1 *Eſp. Rep.* 27. (*m*) *Peake's Cas. N. P.* 81.
(*n*) 4 *Eſp. Rep.* 260.

that

that the plaintiff had hired a certain chaiſe and horſes of the defendant, to carry the plaintiff from a certain houſe, called the *Glouceſter Coffee-houſe*, to *Hounſlow*, the defendant undertook to carry him; then averred a breach that he had not done ſo.

The plaintiff proved, that having been diſappointed of a ſeat in the mail-coach, he ſent for a chaiſe to the defendant, who was a perſon keeping chaiſes for hire; that it came, and his luggage was tied on, and he got into it. The chaiſe was hired to go from the *Glouceſter* coffee-houſe, in *Picadilly*, to *Hounſlow*. Whilſt the plaintiff was ſitting in the chaiſe, the poſt-boy came up and demanded 18*s.*; the plaintiff ſaid it was an exhorbitant charge; that he would pay him when he got to *Hounſlow*, as he could then inquire what was the reaſonable fare. The poſt-boy ſaid, if he did not, he ſhould not go in the chaiſe, but he would take 16*s.*; The plaintiff gave the ſame anſwer as before, and the driver went for his maſter, who came and held the ſame language as the poſt-boy. The plaintiff afterwards tendered the 16*s.* which the defendant refuſed to take, and drove off the chaiſe into the defendant's yard, and the plaintiff was obliged to hire another chaiſe.

Lord *Ellenborough*, Ch. J., in ſumming up to the jury, ſaid, "In ordinary caſes, if a perſon is permitted to go into a chaiſe, and to put on his luggage, it is too late for the perſon who hires out the chaiſe to object to its going on the journey. The owner might make his own regulation: he might ſay, he would not let ſtrangers have his chaiſe, nor go at night, unleſs the money was paid beforehand; and, if it is the uſual mode of his dealing, he had a right to inſiſt on it: but even if that was the courſe of his dealing, if the perſon was in the chaiſe, and tendered the money, the owner of the chaiſe was bound to proceed on the journey: there was an inception of the contract, and he was bound to complete it. If, therefore, the jury find the tender, the plaintiff is entitled to recover." The jury found this fact; and the plaintiff accordingly recovered.

13. *For Salvage of Ship and Goods.*]—A perſon who, by his own labour, preſerves goods which the owner, or thoſe intruſted with the care of them, have either abandoned in diſtreſs at ſea, or are unable to protect and ſecure, is entitled, by the common law of *England*, to retain the poſſeſſion of the goods ſaved, until a proper compenſation

compenſation is made to him for his trouble. (*o*) This compenſation, if the parties cannot agree upon it, may, by the ſame law, be aſcertained by a jury, in an action brought by the ſalvor againſt the proprietor of the goods: or the proprietor may tender to the ſalvor ſuch ſum of money as he thinks ſufficient, and, upon refuſal to deliver the goods, bring an action of *detinue* or *trover* againſt the ſalvor: and if the jury think the ſum tendered ſufficient, he will recover his goods, or their value, and the coſts of his ſuit. (*p*) If the ſalvage is performed at ſea, the Court of *Admiralty* has juriſdiction over the ſubject, and will fix the ſum to be paid, and adjuſt the proportion, and take care of the property pending the ſuit; or, if a ſale is neceſſary, direct a ſale to be made, and divide the proceeds between the ſalvors and proprietors, according to equity and reaſon. (*q*) And in fixing the rate of ſalvage, this court uſually has regard not only to the labour and peril incurred by the ſalvors, but alſo to the promptitude and alacrity manifeſted by them, and to the value of the ſhip and cargo ſaved, as well as the degree of danger from which they were reſcued. (*r*) In the caſe of valuable property, and numerous proprietors and ſalvors, it is obſerved, (*s*) the juriſdiction and proceedings of this court are admirably adapted to the purpoſes of juſtice; but as the delay and expences neceſſarily incident to the proceedings of a high tribunal, ſitting at a diſtance from the ſubject in conteſt, will often be injurious to the parties, the legiſlature has endeavoured to introduce a more expeditious and leſs expenſive mode of adjuſtment. For this purpoſe, ſeveral proviſions were made by a ſtatute, paſſed in the reign of queen *Anne*, (*t*) which were varied and improved by a ſtatute paſſed in the reign of *George* the ſecond; (*u*) and theſe two acts may be conſidered together as forming one body of regulations on this ſubject.

In the firſt place, by the firſt ſection of 12 *Ann*, and the ninth ſection of the 26 *Geo.* II. it is provided, that in all parts of *England*, * except the *Cinque Ports*, all ſheriffs, deputy ſheriffs, juſtices of the peace, and all mayors, bailiffs, and other head officers of corporations and port towns near the ſea, coroners, com-

(*o*) Hartford *v.* Jones, 1 *Lord Raym.* 393. *Abbott on Shipping*, 356.
(*p*) *Abbott* 357. (*q*) *Ibid.* 357. (*r*) *Ibid.* (*s*) *Ibid.* 359.
(*t*) 12 *Ann. ſtat.* 2. *c.* 18. (*u*) 26 *Geo.* 2. *c.* 19.
(*) *Theſe ſtatutes do not extend to Scotland.*

miſſioners of the land-tax, conſtables, headboroughs, tithingmen and officers of the cuſtoms or exciſe, upon application made to any of them, by or on the behalf of the chief officer of any veſſel belonging to the king's ſubjects, or others, in danger of being, or actually being ſtranded or run on ſhore, are empowered and required to command the conſtables of the ports neareſt to the coaſt to call together as many men as ſhall be neceſſary, to the aſſiſtance and for the preſervation of the diſtreſſed ſhip and its cargo; and if any other ſhip belonging to the king, or his ſubjects, happens to be riding at anchor near the place of diſtreſs, the officers of the cuſtoms, and conſtables, or any of them, are empowered and required to demand of the ſuperior officer of ſuch ſhip aſſiſtance by his boats, and ſuch hands as he can conveniently ſpare; and if ſuch ſuperior officer refuſes or neglects to give ſuch aſſiſtance, he forfeits 100*l.*, to be recovered by the ſuperior officer of the ſhip in diſtreſs, with coſts of ſuit, in any court of record.

And to prevent confuſion among the perſons aſſembled, either for want of proper orders, or by contradictory orders, the ſtatute 26 *Geo. c.* 19. *ſ.* 13. declares, that they ſhall conform, in the firſt place, to the orders of the maſter, or other officers or owners, or the perſons employed by them; and, for want of their preſence and directions, to the orders of the perſons authorized to execute theſe ſtatutes, in the following ſubordination, as they happen to be preſent; namely, officers of the cuſtoms, officer of exciſe, ſheriff or his deputy, juſtice of the peace, mayor or chief magiſtrate of a corporation, coroner, commiſſioner of the land-tax, chief conſtable, petty conſtable, or other peace officer, under the penalty of 5*l.* for wilful diſobedience of ſuch orders, to be levied by warrant of a juſtice.

The high ſheriff, by the common law, and by the ſtatute, (v) in caſe of need, and in the abſence of the high ſheriff, any juſtice of the peace may take ſufficient power of the county to repreſs all unjuſt violence, and duly to enforce the execution of the ſtatute. And by the 12 *Ann.* ſtat. 2. c. 18. ſ. 3. the commander of the ſhip in diſtreſs, or officer of the cuſtoms, or conſtable on board the ſame, may repel by force perſons, who, without their conſent,

(v) 26 *Geo.* 2. *c.* 19. *ſ.* 12.

preſs

preſs on board the ſhip, and thereby moleſt them in its preſervation.

And, for the information of perſons intereſted, who may happen to be abſent, it is enacted, by the 26 *Geo.* II. *c.* 19 *ſ.* 15. that the officers of the cuſtoms ſhall, as ſoon as convenient, cauſe all perſons belonging to the ſhip, and others who can give an account thereof, or of the cargo, to be examined, upon oath, before ſome juſtice of the peace, as to the name or deſcription of the ſhip, the names of the maſter and owners, and of the owners of the cargo, and of the places of departure and deſtination, and the occaſion of the ſhip's diſtreſs; which examination the juſtices are to take down, in writing, and to deliver a copy thereof, with a copy of the account of the goods, to the officers of the cuſtoms, who ſhall tranſmit the ſame to the ſecretary of the *Admiralty*, who ſhall publiſh, in the next *London* Gazette, ſo much thereof as ſhall be neceſſary for the information of the perſons intereſted.

And for the encouragement of perſons who give their aſſiſtance, and for adjuſting their reward, the ſtat. 12 *Ann.* ſtat. 2. *c.* 18. *ſ.* 2. provides, "that the *officers** of the cuſtoms, maſter of any ſhip, and all others who ſhall act or be employed in the preſervation of ſhips or goods, ſhall, within thirty days, be paid a reaſonable reward by the maſter, mariners, or owners of the ſhip in diſtreſs, or the merchant whoſe ſhip or goods ſhall be ſaved; and, in default, the ſhip and goods ſhall remain in the cuſtody of the officers of the cuſtoms, or his deputy, until the perſons employed ſhall be reaſonably gratified, or good ſecurity given for that purpoſe to their ſatisfaction: and in caſe, after ſuch ſalvage, the ſuperior officer, mariner, or owners of the ſhip ſaved, or merchant whoſe goods ſhall be ſaved, ſhall diſagree with the officer of the cuſtoms, or his deputy, touching the monies deſerved by any of the perſons employed, the commander of the ſhip ſaved, or owner of the goods, or merchant intereſted therein, and the officer of the cuſtoms, or his deputy, may nominate three of the neighbouring juſtices of the peace, who ſhall thereupon adjuſt the quantum of gratuities to be paid to the ſeveral perſons acting, or being employed in the ſalvage; and ſuch adjuſtments ſhall be binding to all parties, and ſhall be recoverable in an action at law, to be brought in any court of record by the reſpective perſons to whom the ſame may be allotted. And in caſe it ſhall happen that no perſon

* *Vide Abbott* 362. *in notis.*

ſhall

ſhall appear to make his claim to all or any of the goods that ſhall be ſaved, then the chief officer of the cuſtoms, of the neareſt port to the place where the ſhip was in diſtreſs, ſhall apply to three of the neighbouring juſtices of the peace, who ſhall put him, or ſome other reſponſible perſon in poſſeſſion of the goods, ſuch juſtices of the peace taking an account, in writing, of the goods, to be ſigned by ſuch officer of the cuſtoms: and if the goods ſhall not be legally claimed, within the ſpace of twelve months next enſuing, by the rightful owner thereof, then public ſale ſhall be made thereof, and, if periſhable goods, forthwith to be ſold; and, after all charges deducted, the reſidue of the monies ariſing by ſuch ſale, with a fair and juſt account of the whole, ſhall be tranſmitted to the *Exchequer*, there to remain for the benefit of the rightful owner, when appearing; who, upon appearing, affidavit, or other proof made of his right or property thereto, to the ſatisfaction of one of the *Barons* of the coif of the *Exchequer*, ſhall, upon his order, receive the ſame out of the *Exchequer*."

But it is obſerved, (*w*) this ſtatute not containing a proviſion for adjuſtment of the ſalvage, if the contending parties could not agree in the nomination of juſtices, nor providing any method of raiſing money immediately for payment thereof, and being defective in other reſpects, the ſtat. 26 *Geo.* II. *c.* 19. *ſ.* 6. provides, "that the juſtice of the peace, mayor, bailiff, collector of the cuſtoms, or chief conſtable, who ſhall be neareſt to the place where any ſhip or goods ſhall be ſtranded, ſhall forthwith give public notice for a meeting to be held, as ſoon as poſſible, of the ſheriff, or his deputy, juſtices of the peace, chief magiſtrates of towns corporate, coroners, and commiſſioners of the land tax, who, or any five or more of them, are required and empowered to examine perſons upon oath, adjuſt the *quantum* of ſalvage, and diſtribute the ſame among the perſons concerned; and the ſheriff and other perſons before mentioned, attending and acting at the meeting, ſhall each be paid four ſhillings a day for his expences in ſuch attendance, out of the effects ſaved.

And if the charges and rewards of ſalvage directed to be paid by theſe ſtatutes ſhall not be paid, or ſufficient ſecurity given for the ſame, within forty days next after the ſervices performed, the ſeventh ſection of this ſtatute declares, that the officers of the cuſtoms concerned in the ſalvage may borrow and raiſe as much money as ſhall be ſufficient to pay ſuch charges and rewards, or

(*w*) *Abbott* 364.

any

any part thereof then remaining unpaid or unſecured, by bill of ſale, under his hand and ſeal, of the ſhip or cargo ſaved, or a ſufficient part thereof, redeemable, nevertheleſs, upon the payment of the principal borrowed, and intereſt at four *per cent.* (*x*)

The proviſions beforementioned applying only to the caſe of ſervices performed under the orders of perſons authorized to give directions in this reſpect, it is further directed by the fifth of the ſame act, that in caſe any perſon or perſons not employed by the maſter, mariners, or owners, or other perſons lawfully authorized in the ſalvage of any ſhip, or the cargo or proviſion thereof, ſhall, in the abſence of perſons ſo employed or authorized, ſave any ſhip or goods, and cauſe the ſame to be carried, for the benefit of the proprietors, into port, or to any adjoining cuſtom-houſe, or place of ſafe cuſtody, immediately giving notice thereof to ſome juſtice, magiſtrate, cuſtom-houſe or exciſe officer, or ſhall diſcover to any ſuch magiſtrate or officer where any ſuch effects are wrongfully bought, ſold, or concealed, ſuch perſons ſhall be entitled to a reaſonable reward, to be paid by the maſter or owner of the veſſel or goods, and to be adjuſted, in caſe of diſagreement about the quantum, in the ſame manner as ſalvage is to be adjuſted, either by the firſt or latter ſtatute, as the caſe ſhall require. *

Between the paſſing of theſe two ſtatutes, a particular proviſion was made by the ſtat. 3 *Geo.* 1. *c.* 13. *ſ.* 6. for the adjuſting of ſalvage for cables and anchors, from which ſhips are forced in bad weather, within the juriſdiction of the *Cinque Ports*; whereby it is ordained, "That the Lord Warden of the *Cinque Ports* for the "time being ſhall nominate and appoint, by an inſtrument under "his hand and ſeal, three or more ſubſtantial perſons in each of "the *Cinque Ports*, two antient towns, and their members, to "adjuſt and determine any difference relating to ſalvage, if any "ſuch ſhall ariſe between the maſter of any veſſel, and the perſon "or perſons bringing ſuch cable and anchor on ſhore, which ſaid "perſons the ſaid *Lord Warden* is hereby authorized and em-"powered, from time to time, to nominate and appoint; and in "caſe any ſhip or veſſel ſhall be forced from her cables and an-"chors, by extremity of weather, and leave the ſame in any "roads within the juriſdiction of the *Cinque Ports*, and the ſal-"vage cannot be adjuſted between the perſons concerned, that

(*x*) *Vide Abbott*, 365. *n. b.* * *Ibid.* 366.

"then

" then the ſame ſhall be determined within the ſpace of twelve " hours, by any one or more of the ſaid perſons appointed as " aforeſaid, any cuſtom or uſage to the contrary in any wiſe not- " withſtanding."

The authority of the magiſtrates, and other perſons appointed to execute the two ſtatutes of queen *Anne* and *George* the ſecond, does not extend to the *Cinque Ports*; and with regard to thoſe ports, it is provided by the ſtat. 26 *Geo.* II. *c.* 19. *ſ.* 10. that the *Lord Warden* of the *Cinque Ports*, the *Lieutenant of Dover Caſtle*, the Deputy Warden of the *Cinque Ports*, the Judge Official and Commiſſary of the Court of *Admiralty* of the *Cinque Ports*, two antient towns, and the members of, and all and every of them, and all and every perſon appointed by the *Lord Warden*, purſuant to the beforementioned ſtatute of *George the firſt*, ſhall be the perſons to put in execution theſe ſeveral ſtatutes within the juriſdiction of the *Cinque Ports*, two antient towns, and members thereof, in the ſame manner as any juſtice of peace, or other perſons, are authorized to do in other places.*

Theſe ſtatutes have not taken away the juriſdiction or authority which previouſly belonged to any of the ſuperior courts: it is therefore optional in the party to proceed, either in the mode preſcribed by the ſtatutes, or to bring an action of *aſſumpſit* for ſalvage. Indeed an action of this kind was lately brought in the Court of *Common Pleas*, where it appeared, that a ſhip being in danger, and the captain and part of the crew having made their eſcape, a paſſenger, at the requeſt of the reſt of the crew, took the command, and brought the ſhip ſafe to port. The merits of the paſſenger, in ſaving the ſhip, were acknowleded by the owner, in a letter to one of the underwriters, wherein he expreſſed his deſire to make him a compenſation; and it was determined that the paſſenger was entitled to ſue the owner for ſalvage. (*y*)

14. *For Procuring an Act to be done.*]—A promiſe to pay a ſum of money in conſideration of the procuring a particular purchaſe, is valid; and when the purchaſe is completed, an action of *indebitatus aſſumpſit* for work and labour will lie againſt the party promiſing.

* *Abbott.* 367. (*y*) Newman v. Walters, 3 *Bos. and Pul.* 612.

Thus,

Thus, in the case of *Gordon* v. *Martin*, (z) which was an action of *indebitatus assumpsit*, wherein the plaintiff declared that the defendant being indebted to him in the sum of 300*l.* for work and labour done by the plaintiff, at the special instance and request of defendant, did promise to pay him the said sum; the general issue having been pleaded, the plaintiff's evidence was this:

A letter wrote by the defendant to him to this effect: "If *L. S.* shall go through the purchase (the defendant's brother having been then in treaty with the said *L. S.* for the sale of an estate,) my brother will give you a handsome gratuity for the trouble and pains you shall be at in transacting that affair, which I promise and assure you shall not be less than 300*l.*" And by way of postscript, as follows: "My meaning is, you shall be paid when the conveyances shall be executed." It was proved at the trial, that the plaintiff had forwarded the said purchase, and that *L. S.* was greatly induced thereto by the good opinion he had of the plaintiff's veracity and judgment, and his recommendation of the said purchase; and whether this evidence maintained the declaration, was saved for the opinion of the Court.

The whole Court held, that though the promise was, that the defendant's brother should pay the gratuity, yet it bound the defendant as much as if he had promised for himself; for the work and labour was at his request, and upon his credit: and Mr. Justice *Lee* said, "that there was a difference between a conditional and an absolute undertaking; as if *A.* promise to *B.* such a sum, if *C.* does not, there *A.* is but a security for *C.*: but if *A.* promise that *C.* will pay such a sum, *A.* is the principal debtor; for the act done was on his credit, and no way upon *C.*"

"That an *indebitatus assumpsit* will not lie upon a special agreement till the terms of it are performed; but when that is done, it raises a duty for which a general *indebitatus assumpsit* will lie:" and by the whole Court the plaintiff had judgment.

So, an action will lie upon a promise, in consideration that *A.* would procure for *B.* the enjoyment of a house, with an averment that he had procured it. (a)

(z) *Fitzg.* 302. (a) *Yel.* 11.

So, if *A.* promiſe *B.* 10*l.*, in conſideration that he would procure him one who would give him an annuity of 100*l. per annum* for 900*l.* *B.* does not do it, but procures him one who grants it for 1000*l.*, and *A.* does agree for that annuity, *B.* cannot bring an *aſſumpſit* for the 10*l.* becauſe this varies from the contract; but he may have a *quantum meruit.* (*b*)

So, in *Webb*'s caſe, (*c*) where the plaintiff declared, that whereas *Cobham* was indebted to *J. S.*, and *J. S.* to the defendant, the ſaid defendant, in conſideration that the plaintiff would procure the ſaid *J. S.* to make a letter of attorney to the defendant to ſue the ſaid *Cobham*, promiſed to pay and give to the plaintiff 10*l.* It was objected, here was not any conſideration for the *aſſumpſit*; for the defendant, by this letter of attorney, gets nothing but his labour and travel: but the exception was not allowed of; for in this caſe, not ſo much the profit which redounds to the defendant, as the labour of the plaintiff in procuring of the letter of attorney is to be reſpected.

So, in *Bartlett* v. *Viner*, (*d*) upon a motion in arreſt of judgment, the caſe was, an action brought by the adminiſtrator of *Bartlett* againſt the executors of Sir *Robert Viner*; upon ſuch a promiſe made by Sir *Robert* to the inteſtate, *ſcil.*: "If you will procure "15,000*l.* to be paid into the exchequer, upon the aid of 12*d.* in "the pound, in my name, or the name of ſuch perſon as I ſhall "direct, I will give you 600*l.* &c." Upon the trial, a verdict was given for the plaintiff; and *Darnell* ſaid that the action did not lie, becauſe it is brokage, and againſt the ſtatute of uſury; and it being a promiſe againſt law, it is not obligatory.

But upon conſideration of the caſe, the Court *ſeriatim* delivered their opinion, that the plaintiff ought to have his judgment; "for nothing appears here in the declaration againſt law; for the borrower does not pay brokage, nor the lender receive it; but the agreement is between two perſons not concerned but only in the procuring the money; and this was an advantage to the defendant, and might be in many caſes; as if *A.* is in debt to *B.* and cannot pay him, and *B.* has occaſion for his money, or miſtruſts that he ſhall loſe it; and *A.* ſays to *B.* that he cannot pay him, but if he will procure *C.* to lend him the money, that he will pay him; and *B.* ſays to *C.* that if he will lend to *A.* 100*l.* that he will give

(*b*) *Per* Powell, *Juſt.* 12 *Mod.* 509. (*c*) 4 *Leon.* 110.
(*d*) *Skin.* 322. *Carth.* 251. *S. C.*

him

him 1*ol.*, this is a lawful agreement, and not within the ſtatute; for *B.* has a benefit by it, and *A.*, the borrower, does not pay any thing; but *C.*, the lender, has 10*l.* from *B.*, the which he is willing to abate for his own conveniency. But the caſe at the bar is ſtronger; for here neither the borrower pays, nor the lender receives any thing, but the conſideration is wholly between perſons not intereſted in the money: but if any thing had appeared againſt law in the declaration, or upon the pleadings, though it was not prohibited in the ſtatute, but only a penalty annexed, the agreement is void; for though the difference in *Hob.* 187, *Jones* v. *Jones*, ſtands, yet in every caſe where a penalty is annexed to the doing of ſuch an act, though it be not prohibited, yet if ſuch a thing appears upon the record to be the conſideration, the agreement is void; for it will be ridiculous to give judgment that the plaintiff ſhall recover ſuch a thing, the which if he takes, he ſhall be ſubject to the penalty of a ſtatute; and therefore in every caſe where a ſtatute inflicts a penalty for doing ſuch an act, though the act be not prohibited, yet the thing is unlawful; for it cannot be intended that a ſtatute would inflict a penalty for a lawful act; and *una voce* ruled, that the plaintiff ſhould have his judgment."

15. *For endeavouring to obtain a Pardon.*]—If a man requeſts another to labour for his pardon, &c. and after he has done his endeavour, if the other ſays, in conſideration that he has laboured for his pardon at his own charge, he promiſes to pay him ſo much, &c. this has been held to be a good conſideration. (*e*)

But, in the caſe of *Norman* v. *Cole*, (*f*) which was an action of *aſſumpſit* for money had and received, to recover a ſum of 30*l.* which had been depoſited in the hands of the defendant, under the following circumſtances: One *Tunſtall* being under ſentence of death, in *Newgate*, the plaintiff was prevailed upon to lodge that ſum in the hands of the defendant, to be applied to the purpoſe of procuring him a pardon.

On the caſe being opened, Lord *Eldon*, Ch. J. expreſſed a doubt whether the action was maintainable, ſaying "that he would

(*e*) Lampleigh v. Braithwaite, *Hob.* 105. *Moor* 866. *S. C. Brownl. & S. S. C. Sty.* 465. (*f*) 3 *Eſp. Rep.* 253.

hold the plaintiff to very ſtrict proof of the means uſed to procure the pardon;" and called on the plaintiff's counſel to ſhow upon what grounds they founded their right to recover.

They ſtated that *Tunſtall* was a man of good character before his conviction: that one *Morland* being a perſon of good connexions, and having acceſs to perſons of intereſt, the money was to be given to him for ſo uſing his intereſt, by repreſenting in favourable terms, the caſe and character of *Tunſtall*.

Lord *Eldon*, Ch. J. then ſaid, "I cannot ſuffer this cauſe to proceed. I am of opinion, this action, is not maintainable: where a perſon interpoſes his intereſt and good offices to procure a pardon, it ought to be done gratuitouſly, and not for money: the doing an act of that deſcription, ſhould proceed from pure motives, not from pecuniary ones. The money is not recoverable."

16. *For giving Information and aſſiſting Perſons to recover money bequeathed to them, &c.*] An agreement to pay a *per centage* upon the day on which any money ſhould be received, by the defendant through the means of the plaintiff's information does not entitle the plaintiff to the ſtipulated reward upon the transfer of ſtock in conſequence of ſuch information, although he might afterwards receive the dividend thereon.

Thus, in the caſe of *Jones* v. *Brinley*, (*g*) the plaintiff declared upon a ſpecial agreement, that in conſideration that he had ſtated to the defendant that it was in his (the plaintiff's) power to give the defendant certain information, which might enable one *F. N.* to receive a conſiderable ſum of money then due to him, and alſo in conſideration, that the plaintiff at the requeſt of the defendant would give ſuch information to the defendant as might enable the ſaid *F. N.* to receive the ſaid ſum, the defendant undertook and promiſed the plaintiff to pay him on the day upon which any money ſhould be received by *F. N.*, or by the defendant on *F. N.*'s behalf through the means of the plaintiff's information, the ſum of 10*l. per cent.* on the money ſo received. The declaration then averred that the plaintiff did give the defendant certain information reſpecting divers ſums of money which *F. N.* was entitled to receive under and by virtue of the

(*g*) 1 *Eaſt Rep.* 1.

laſt will and teſtament of one *A. N.* deceaſed, and that if *F. N.* through the means of ſuch information on the 27th *January* 1800. did receive the ſum of 500*l.* whereby the defendant by virtue of his promiſe became liable to pay to the plaintiff 50*l.* &c. The ſecond count ſtated more generally, that the defendant was indebted to the plaintiff in ſo much for certain information given by the plaintiff to the defendant at his requeſt, whereby *F. N.* was enabled to receive, and did accordingly receive divers large ſums before then due to him, and being ſo indebted the defendant promiſed, &c. There was alſo the general money counts, and for work and labour. The defendant pleaded the general iſſue.

At the trial before Lord *Kenyon*, Ch. J. the agreement in writing was proved, whereby the defendant "undertook to pay to the plaintiff on the day upon which any money ſhould be received by *F. N.* or by him (the defendant) on his behalf, through the means of the plaintiff's information, the ſum of 10*l. per cent.* on the money which ſhould be ſo received." It was alſo proved, that in conſequence of information given by the plaintiff to the defendant, *F. N.* had obtained 500*l.* ſtock, which had ſtood in the name of *A. N.* from whom the defendant derived title as reſiduary legatee; and evidence was adduced for the purpoſe of ſhowing, that he had afterwards received ten years' dividends due thereon. It was objected by the defendant's counſel that it was ſtock, and not money, which had been obtained through the medium of the plaintiff's information, and therefore he was not entitled to recover any thing under the terms of the agreement; and that the dividends were merely conſequential to the ſtock: and it was not the meaning of the parties that 10*l. per cent.* ſhould be paid upon all the intereſt which might accrue, but merely for the principal ſum, if any. Lord *Kenyon* admitted the objection, and nonſuited the plaintiff.

A motion was afterwards made to ſet aſide the nonſuit, upon the ground that the proof ſuſtained the agreement; for ſtock was to be eſtimated as ſo much money, into which it was convertible; and that at any rate the receipt of the dividends, due at the time of the transfer of the ſtock was a receipt of ſo much money within the meaning of the agreement. But the Court thought the objection well founded; and animadverted upon the immorality of ſuch bargains as the one in queſtion, which had grown of late into practice.

17. *For Services performed voluntarily, but with a View to be rewarded by a Legacy, &c.*] Where ſervices are performed voluntarily, and not with any view of immediate reward, but merely in expectation of a legacy; and the perſon for whom they are done dies without leaving ſuch expected legacy, no action will lie againſt the executor or adminiſtrator for a recompence for ſuch ſervices.

Thus, in the caſe of *Oſborne* v. the *Governors of Guy's Hoſpital*, (*b*) which was an action of *indebitatus aſſumpſit* for work and labour in tranſacting Mr. *Guy*'s ſtock affairs in the year 1720. It appeared that the plaintiff was no broker but a friend; and it looked ſtrongly, as if he did not expect to be paid, but to be conſidered for it in his will. And the chief juſtice directed the jury, "that if that was the caſe, they could not find for the plaintiff, though nothing was given him by the will; for they ſhould conſider how it was underſtood by the parties at the time of doing the buſineſs, and a man who expects to be made amends by a legacy, cannot afterwards reſort to his action."

So in the caſe of *Hiccox* v. *Proud*, (*i*) which was an action of *aſſumpſit* on an apothecary's bill for medicines and attendance. It appeared that the plaintiff had never made any regular entries in his books but had attended the teſtator in expectation of a legacy, he being related to him; and that he had declared, that had the teſtator left him any thing, he would never have made a charge. The plaintiff was nonſuited on the principle laid down in the laſt caſe.

But in the caſe of *Le Sage* v. *Couſmaker* and others executors, (*k*) which was an action of *aſſumpſit* for work and labour; the caſe was as follows:

The defendants were the executors of one *Vanveyhever*. The plaintiff was a ſtock-broker, and in the life-time of the teſtator, had tranſacted all his money concerns to a conſiderable extent; it was alſo given in evidence, that he had been employed by the teſtator in ſeveral matters, ſuch as keeping his books, tranſlating his letters, &c. and that he was alſo in the habit of doing for him ſeveral acts of attention, and rendering him many ſervices of that nature.

The defendants reſiſted the plaintiff's demand on the grounds that the teſtator being a man of very great wealth and uncommon

(*b*) *Stra.* 728, *Eſp. N. P.* 87. (*i*) *Staff. Lent Aſſ.* 1762, *cor.* Wilmot *Juſt.* (*k*) 1 *Eſp. Rep.* 187.

parſimony,

parſimony, a foreigner, and without a relation, that the ſeveral ſervices upon which the plaintiff grounded his action, were gratuitous, and done ſolely with a view to a legacy on the teſtator's death. It was further relied on, that a bill having been filed by the executors, all the creditors of the teſtator's eſtate had been called upon under a reference to a Maſter in the Court of *Chancery*, to put in their ſeveral claims, and that the plaintiff, having made his claim, the Maſter had diſallowed it. And the counſel for the defendants, contended, firſt that the legacy muſt be taken as a complete ſatisfaction; and ſecondly, that the reference to the Maſter muſt be conſidered as referring of claims to an arbitrator; and he having awarded nothing to be due to the plaintiff, that it was a complete anſwer to the caſe. He then gave in evidence the payment of a legacy of 40*l.* to the plantiff, under the teſtator's will, and alſo the Maſter's report, by which he diſallowed the plaintiff's claim againſt the eſtate.

Lord *Kenyon*, Ch. J. ruled, that neither was an anſwer to the plaintiff's demand: "that a legacy was never deemed a ſatisfaction for a legal demand, when that demand was unliquidated at the time of the legacy given, nor where it was given before the time when the demand accrued, or the debt was contracted, unleſs it was expreſsly ſaid in the will that it ſhould be a ſatisfaction; that nothing in this caſe appeared which could operate as an ademption of the legacy. As to the Maſter's report, his lordſhip ſaid it eſtabliſhed nothing, that the party ſhould never be concluded by it from ſuing in the regular courſe of law for his demand, though the Maſter might think fit to report that nothing was due. His lordſhip added that the law was well ſettled; that if the plaintiff had undertaken the ſeveral ſervices proved, without any view to a reward, but with a view to a legacy, that he could not ſet up any demand againſt the teſtator's eſtate, but of that the jury were to decide." The jury found for the plaintiff 600*l.* damages.

CHAPTER XIII.

Of Contracts to Marry, and to Pay Money in Consideration of Marriage.

1 *Of Contracts to marry.*] If a man and woman, being unmarried, mutually promiſe to marry each other, and afterwards the man marries another woman, by which he renders himſelf incapable of performing his contract, an action of *aſſumpſit* lies, in which the woman ſhall recover damages; for though matrimonial cauſes are regularly cognizable in the ſpiritual courts, yet the contract in ſuch caſe being executory, and revoked by the huſband by the ſubſequent marriage could not be enforced by *eccleſiaſtical cenſures*, as a contract *in præſenti* may; hence, therefore, there being no adequate remedy in the ſpiritual courts, and marriage being an advantage, and the loſs of it a temporal loſs, it is fit that there ſhould be a remedy in the temporal courts, otherwiſe there would be a failure of juſtice. (*a*)

Thus, in the caſe of *Rutter* v. *Hebden*, (*b*) which was an action of *aſſumpſit* in conſideration that the plaintiff would marry the defendant; he promiſed to marry her. After verdict for the plaintiff; it was moved that it was a matter *eccleſiaſtial* on which no action at law would lie. But the Court would not permit it to be argued, but gave judgment for the plaintiff.

So, in caſe of *Harriſon* v. *Cage* and wife, (*c*) which was alſo an action of *aſſumpſit*, againſt the defendant and his wife, on a ſpecial promiſe of the woman before marriage, which was, "That in conſideration the plaintiff, *Harriſon*, being a bachelor,

(*a*) *Bac. Abr.* tit. *Aſſumpſit*, A. (*b*) 1 *Lev.* 147. 1 *Sid.* 180. *S. C.* 1 *Rol. Abr.* 22. *pl.* 20. *Sty.* 295. 304. Holcroft v. Dickenſon, *Carter.* 233. *S. P. And note, theſe contracts to marry are not within the ſtatute of frauds. Vide ante Vol.* 1. *Ch.* 4. *ſ.* 3.

(*c*) *Carth.* 467. 1 *Salk.* 24. 1 *Ld. Raym.* 386. 5 *Mod.* 411. *S. C.*

"had

" had on ſuch a day and place promiſed to take her (whilſt ſole) " to wife, ſhe, whilſt ſhe was ſole, &c., promiſed the plaintiff " to take him for her huſband;" then he averred in fact, that he had tendered himſelf to marry her, and had requeſted her to marry him, but that ſhe refuſed, and afterwards married the defendant.

Upon *non aſſumpſit* pleaded, the cauſe was tried, and a verdict was found for the plaintiff, damages 400*l.*, the woman being worth 3000*l.*, when the plaintiff courted her, and afterwards by the death of her brother worth double that ſum. It was moved in arreſt of judgment, that this action would not lie upon the promiſe of marriage made by the woman; for the law doth not intend that the man is advanced by marriage; and therefore ſuch a promiſe of marriage to him is of no conſideration in law, and by conſequence no action can be founded thereon. But it is otherwiſe where a man promiſeth to marry a woman, becauſe in the eye of the law marriage is an advancement to the woman.

It was alſo contended that this promiſe was void for uncertainty, for there was no certain time agreed on when the marriage ſhould take effect.

To which it was anſwered, and ſo reſolved, *per curiam*, "That here were reciprocal promiſes, and therefore as her promiſe to him was a good conſideration to make his promiſe obligatory, ſo by the ſame reaſon his promiſe to her was a ſufficient conſideration to make her promiſe binding in this caſe as well as in any other mutual agreements." And the Court did not allow that diſtinction between the advancement of a man and of a woman in marriage, and that this was a good promiſe, though the certain time of marriage was not agreed on, eſpecially ſince the plaintiff averred, that he had offered to marry her, and that ſhe refuſed, which in this caſe was neceſſary to be done, to entitle the plaintiff to this action.

The reporter adds, that it had been moved before for a new trial, becauſe of the exceſſive damages; but upon reference to the Chief Baron, *Ward*, he certified that the promiſe of the woman was well-proved, and that the damages were more than he expected; but that he did not think them ſo exceſſive as to ſet aſide the verdict. Judgment was therefore given for the plaintiff.

So,

So, in the case of *Hutton* v. *Mansell*, (*d*) an action of *assumpsit* was brought, laying mutual promises of marriage between the plaintiff and the defendant, and a refusal on the part of the man, who was the defendant. And upon evidence an express promise was proved to have been made by the man, but none by the woman. And *per Holt*, Ch. J. " If there be an express promise by the man, and it appear the woman countenanced it, and by her actions at the time behaved herself so as if she agreed to the matter, though there be no actual promise, yet that shall be sufficient evidence of a promise of her side. And he said, he remembered a case in which he had been counsel, in Lord Chief Baron *Montague*'s time, where it had been so ruled upon evidence against his client, and being then dissatisfied therewith, he put the case to eminent men of those times, who all concurred in opinion with the Chief Baron."

So, if an infant and a person of full age mutually promise to intermarry, the infant, although not bound by her promise, may, notwithstanding, maintain an action for breach of promise by the adult.

Thus, in case of *Holt* v. *Ward*, (*e*) the declaration stated, that it was mutually agreed between the plaintiff and defendant, that they should marry at a future day, which is past, and that in consideration of each other's promises, each engaged to the other; notwithstanding which the defendant did not marry the plaintiff, but had married another, which she laid to her damage of 4000*l*. The defendant pleaded *non assumpsit*, and that the plaintiff, at the time of the promise, was an infant of fifteen years of age. Upon the plea of *non assumpsit* issue was taken.

And at the trial thereof a verdict was found for the plaintiff, with 200*l*. damages. But to the plea of infancy, the plaintiff demurred; and the case was several times argued at the bar; and the Court appointed an argument by *Civilians*, to see what their law would determine in such a case.

Upon the argument of the *Civilians*, no instance could be shown wherein they had compelled the performance of a minor's contract. And they who argued for the defendant, strongly in-

(*d*) 6 *Mod.* 172. 3 *Salk.* 16. *S. C.* (*e*) 2 *Stra.* 937. *Fitzg.* 275.

sisted,

fiſted, that in the caſe of a contract *per verba de futuro*, (as this was,) there was no remedy, even againſt a perſon of full age, in the ſpiritual court; but only an admonition. And the only reaſon why they hold juriſdiction in the caſe of a contract *per verba de præſenti* is becauſe that is looked upon amongſt them to be *ipſum matrimonium*, and they only decree the formality of a ſolemnization in the face of the church.

Raymond, Ch. J. afterwards delivered the reſolution of the court as follows: "The objection in this caſe is, that the plaintiff not being bound equally with the defendant, this is *nudum pactum*, and the defendant cannot be charged in this action. Formerly it was made a doubt by my Lord *Vaughan*, (*f*) whether any action could be maintained on mutual promiſes to marry; but that is now a point not to be diſputed. And as to the preſent caſe, we ſhould have had no difficulty in giving judgment for the plaintiff, if we could have been ſatisfied by the arguments of the *Civilians*, that as the plaintiff was of the age of conſent, any remedy, though not by way of action for damages, could be had againſt her. But ſince they ſeem to have had no precedent in the caſe, we muſt conſider it upon the foot of the common law. And upon that the ſingle queſtion is, whether this contract, as againſt the plaintiff, was abſolutely void. And we are all of opinion, that this contract is not void, but only voidable at the election of the infant: and as to the perſon of full age it abſolutely binds.

"The contract of an infant is conſidered in law, as different from the contracts of all other perſons. In ſome caſes his contracts ſhall bind him; ſuch is the contract of an infant for neceſſaries, and the law allows him to make this contract as neceſſary for his preſervation; and therefore, in ſuch a caſe, a ſingle bill ſhall bind him, though a bond with a penalty ſhall not; 1 *Lev.* 87.

"Where the contract may be for the benefit of the infant, or to his prejudice; the law ſo far protects him as to give him an opportunity to conſider it when he comes of age; and it is good, or voidable at his election. *Cro. Car.* 502. 2 *Roll.* 24. 427. *Hob.* 69. 1 *Brownl.* 11. 1 *Sid.* 41. 1 *Vent.* 21. 1 *Mod.* 25. Sir

(*f*) *Carter*, 233.

W. Jones,

W. Jones, 164. But though the infant has this privilege, yet the party with whom he contracts has not: he is bound in all events. And as marriage is now looked upon to be an advantageous contract, and no distinction holds whether the party suing be man or woman, but the true distinction is, whether it may be for the benefit of the infant; we think that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infants' contracts. And no dangerous consequence can follow from this determination, because our opinion protects the infant even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts, &c. For these reasons we are all of opinion, that the plaintiff ought to have her judgment upon the demurrer."

But, a promise by a man to pay to a woman a sum of money, if he shall marry any body else, is considered as a restraint of marriage, and therefore void.

Thus, in the case of *Lowe* v. *Peers*, (g) which was an action of *covenant* upon a marriage contract; being a promise under the defendant's hand and seal in the following words: "I do here- "by promise Mrs. *Catherine Lowe*, that I will not marry with "any one person besides herself: if I do I agree to pay the said "*Catherine Lowe* 1000*l.*, within three months, &c."

The second count of the declaration averred, that the plaintiff was ready to marry the defendant whilst he continued single, but that after the making of the deed, he married another woman, namely, one *Elizabeth Gardiner*: yet the defendant did not, when requested by the plaintiff, pay the 1000*l.*, but on the contrary refused so to do.

At the trial, the plaintiff obtained a verdict for the 1000*l.* But it was afterwards moved, in arrest of judgment, that this contract was not valid in law; and it was argued "that all engagements in restraint of marriage are void. That this engagement is of that sort. That there is no consideration for this contract. It is not reciprocal: here is no mutuality, which is essential to the validity of a contract.

(g) 4 *Burr.* 2225.

It

It was anſwered, that this whole tranſaction amounts to a mutual promiſe "to marry each other." The plaintiff's acceptance of this deed is ſufficient evidence of her making ſuch a promiſe. So that there were mutual promiſes; and both were bound to perform them. Therefore there was a conſideration for the defendant's promiſe. However this promiſe is by a deed; and a deed carries its own conſideration.

And this is not an engagement in reſtraint of marriage generally: it is only a reſtraint from marrying any body elſe but each other. Therefore it is not like the caſe of *Baker* v. *White*, in 2 *Vern.* 215. or that of *Woodhouſe* v. *Shepley*, in 2 *Atkins*, 53.

The Court, however, determined that the contract was illegal, and the judgment was accordingly arreſted. Lord *Mansfield*, Ch. J. ſaid: "All theſe contracts ought to be looked upon, (as Lord *Hardwicke* ſaid in caſe of *Woodhouſe* v. *Shepley*,) with a jealous eye; even ſuppoſing them clear of any direct fraud. In that caſe Lord *Hardwicke* did not proceed on any circumſtances of particular actual fraud; but on public and general conſiderations: and therefore he gave no coſts.

Theſe engagements are liable to many miſchiefs; to many dangerous conſequences. When perſons of different ſexes, attached to each other, and thus contracting to marry each other, do not marry immediately, there is always ſome reaſon or other againſt it; as diſapprobation of friends and relations, inequality of circumſtances, or the like. Both ſides ought to continue free: otherwiſe ſuch contracts may be greatly abuſed; as by putting women's virtue in danger, by too much confidence in men, or by young men living with women without being married. Therefore theſe contracts are not to be extended by implication. But here is not the leaſt ground to ſay, "that this man has engaged "to marry this woman," much leſs does any thing appear of her engaging to marry him. There is a great difference between promiſing to marry a particular perſon, and promiſing not to marry any one elſe. There is no colour for either of theſe conſtructions that have been offered by the plaintiff's counſel. This is only a reſtraint upon him againſt marrying any one elſe beſide the plaintiff: not a reciprocal engagement "to marry each other;" or any thing like it. This penalty is ſet up againſt the defendant,

defendant, after ten years have paſſed without any intercourſe between the plaintiff and him. Another reaſon why we ſhould not ſtrain in favour of this contract is, becauſe if there was really any mutual contract, under fair and equal circumſtances, the plaintiff will ſtill be at liberty to bring her action: for a void bond can never ſtand in her way. Therefore I think that what paſſed at the trial was perfectly right; that the meaſure of damages was the 1000*l.*, and that this was ſuch a contract as ought not to be carried into execution. The caſe of *Baker* v. *White*, was not near ſo ſtrong as the preſent caſe, that was in reſtraint of *Elizabeth Baker*'s marrying again. There is a difference between a reſtraint of a firſt marriage and a reſtraint of a ſecond marriage: the plaintiff there was a widow when ſhe gave the bond. And the tranſaction was, in effect, a mere wager, and nothing at all unfair in it: and yet in that caſe the bond was decreed to be delivered up to be cancelled.

Yates, J. ſaid: "This agreement is in reſtraint of marriage. It is not a covenant "to marry the plaintiff; but not to marry any one elſe." And yet ſhe was under no obligation to marry him. So that it reſtrained him from marrying at all, in caſe ſhe had choſen not to permit him to marry her."

An action of covenant muſt be founded on the covenant, and the breach aſſigned within the words of it. Now if ſhe had requeſted him to marry her, and been refuſed by him, how muſt ſhe have aſſigned the breach of his covenant? Why, "That "he being requeſted by her to marry her, he had refuſed to do "ſo." But what obligation was he under "to marry her." Or where was the breach of his covenant? This covenant ſays no ſuch thing, as that "he would marry her." Tender and refuſal muſt apply to the thing ſtipulated: but he has not ſtipulated, "that he would marry her." As to mutuality of contract, the deed does not import, that ſhe ſhall marry him: neither doth her acceptance of it import any ſuch thing. It does not follow from her acceptance of the deed, that ſhe either underſtood he meant to bind himſelf to marry her, or that ſhe engaged to marry him. Poſſibly he might not at all mean to marry her, though he bound himſelf not to marry any one elſe. They are two quite different things:

things: one does not follow from the other. This covenant is illegal, and will support no action: and therefore the plaintiff ought to recover nothing upon it.

In an action for breach of promise of marriage, where the defence is that the plaintiff was a woman of bad character, the character which a witness heard of her in the neighbourhood where she lived, is good evidence.

Thus, in the case of *Foulkes* v. *Sellway*, (*i*) which was an action of *assumpsit* for breach of promise of marriage. The defence was, that the plaintiff was a woman of bad character; and evidence was given of one instance of gross misconduct. The defendant's counsel then called a witness to prove, that she was a woman of general bad character. The witness gave evidence of his having gone to the place where she lived to inquire into her character, and was proceeding to state what he had there heard; but it was objected that the witness should not be allowed to give evidence of what he heard from third persons; if they, from their own knowledge, knew the plaintiff's character they should be called to state it, and their representations should not be taken at second hand, as the plaintiff was thereby prevented from cross examining the witnesses as to their reasons for the character they gave.

Lord *Kenyon*, Ch. J. said: "He was of opinion the evidence was admissible. Character here was the only point in issue. That was public opinion, founded on the conduct of the party, and was a fair subject of inquiry; he therefore ruled that what that public thought was evidence on the issue as it then stood.

2. *Of Contracts to pay Money in Consideration of Marriage.*] An action will lie upon a contract or promise to pay money in consideration of marriage. (*k*)

Thus, in the case of *Robert Browne* and wife v. *Garborough*, (*l*) which was an action of *assumpsit*, upon a promise made to the

(*i*) 3 *Esp. Rep.* 236. (*k*) *Note, such promises must now be reduced into writing. Vide Statute of Frauds and Perjuries. Ante, Vol.* 1. *Chap.* 4. *f.* 8.

(*l*) *Cro. Eliz.* 63. *Note, indebitatus assumpsit will not lie for money payable in consideration of marriage; it must be on the special promise. Vent.* 268.

feme

feme dum ſola fuit: the declaration ſtated, that whereas a communication was between *J. Browne*, father of the plaintiff *Robert*, and the defendant, couſin of the ſaid *Robert Browne*, and the ſaid *feme*, when ſhe was ſole, of a marriage to be had between the ſaid plaintiffs; and the ſaid *J. Browne* promiſed to the *feme*, that if the marriage did take effect, that he would aſſure to them ſuch land, &c. And the defendant did then promiſe to her, that if *J. Browne* did not perform his promiſe, the defendant would give her 100*l.*, and alleges, that the marriage did take effect, and the lands were not aſſured, &c. Upon *non aſſumpſit*, it was found for the plaintiff. But it was moved in arreſt of judgment, that there was no ſufficient conſideration to ground the promiſe; for the *feme* was a mere ſtranger to the defendant, and there was no reaſon for him to give her 100*l.* in marriage. But it was anſwered, that there was a good conſideration; for it was alleged, that the defendant was kinſman to *Robert Browne*, the plaintiff, and it is to be intended that by reaſon of theſe words ſhe was induced to marry *R. Browne*, which otherwiſe ſhe would not have done; and they directed judgment to be entered for the plaintiffs: and upon a writ of error brought, the judgment was affirmed; for, peradventure, ſhe truſted the defendant rather than *J. Browne*, and the defendant was couſin to the ſaid *R. Browne*, the plaintiff.

So, if *B.* the daughter of *A.* be heir apparent to *C.*, and *D.* promiſes to *A.*, the mother, in conſideration that ſhe would conſent and agree that the ſaid *B.*, her daughter, ſhould marry his ſon, that he would give to the ſaid *A.* 100*l.*, upon which *A.* conſents, and the marriage takes effect; this is a good conſideration; for nature has given the power of diſpoſing to parents, and in nature their children are bound to obey them. (*m*)

So, if *A.* in conſideration that *B.* will marry his daughter, aſſumes and promiſes to give to *B.* 20*l.*, and give to him twenty *French pieces*; this is a good promiſe; for this, according to our uſual ſpeech, ſhall be intended *French crowns*, which are the common coin of *France*, and here known. (*n*)

(*m*) *Mo.* 595. *pl.* 808. 857. *pl.* 1176. *Hob.* 10. 1 *Brownl.* 18. *Hutt.* 39. 1 *Dan. Abr.* 47. 1 *Vin. Abr.* 303. (*n*) Poynter v. Poynter, *Cro. Car.* 194.

So,

So, if *B.* promiſes *A.* in conſideration of marriage between *A.* and *C.*, the daughter of *B.*, that he will pay to *A.* 100*l.* at a time after, and in the mean time to pay according to the rate of 8*l.* for the intereſt thereof, this is a good conſideration; the promiſe being upon a marriage, and not for money lent. (*o*)

So, if a man promiſes another, in conſideration that he will marry his daughter, to give him as much as he hath given, or ſhould give with any of his other daughters, if after he gives ſuch a ſum with another of his daughters, and dies, an action upon this *aſſumpſit* lies againſt the adminiſtrator notwithſtanding it be collateral. (*p*)

In *Marſh* & *Rainsford*'s caſe, (*q*) there was a communication of marriage between *M.* and the daughter of *R.* and of 200*l.* to be given with the daughter, but they could not agree on the day of payment. *Marſh* ſtole away the daughter, and married her without the knowledge or conſent of the father; but afterwards *R.* agreed and promiſed that in conſideration he had married his daughter, he would give him 200*l.*, and afterwards *M.* brought an action of *aſſumpſit*, and recovered that ſum.

So, in another like action of *aſſumpſit*, (*r*) brought upon a promiſe of 20*l.* made to the plaintiff by the defendant in conſideration that the plaintiff, at the ſpecial inſtance of the ſaid defendant, had taken to wife the couſin of the defendant, that was good cauſe, although the marriage was executed and paſſed before the undertaking and promiſe, becauſe the marriage enſued the requeſt of the defendant.

But in the caſe of *Sandhill* v. *Jenny*, (*s*) where the plaintiff declared, that in conſideration that the plaintiff had formerly married his daughter at his ſpecial inſtance and requeſt, the defendant promiſed the plaintiff to pay him every year, during the life of the defendant, 10*l.*, &c. The plaintiff, upon *non aſſumpſit* pleaded, had judgment; but upon a writ of error in the *exchequer chamber* the judgment was reverſed, becauſe the marriage was executed before the promiſe made, yet the declaration ſuppoſes that the defendant requeſted the plaintiff to the marriage.

(*o*) 1 *Vin. Abr.* 297. *pl.* 15. 2 *Sid.* 116. *S. P.* (*p*) 1 *Vin. Abr.* 287. *pl.* 3. *See alſo* 3 *Bulſt.* 235. 248. 1 *Rol. Rep.* 193. 433. *pl.* 29. *Poph.* 148. 2 *Roll. Rep.* 104. *Cro. Jac.* 417.

(*q*) 2 *Leon.* 111. *Cro. Eliz.* 59. *Dy.* 272. *b in marg.* 3 *Lev.* 366.

(*r*) *Dyer*, 272. *b. pl.* 32. (*s*) *Ibid.* 272. *b. in marg.*

So, if there be a diſcourſe between the father of *A.* and *B.*, in relation to a marriage between the ſaid *A.* and the daughter of *B.*, and *B.* then affirms and publiſhes to the father of *A quod daret ei qui maritaret* his ſaid daughter with his conſent 100*l.*, and after *A.* marries the daughter of *B.* with his conſent; yet this affirmance and publication of *B.* ſhall raiſe no promiſe upon which an action may be brought, becauſe theſe words do not include any promiſe. (*t*)

(*t*) 1 *Rol. Abr.* 6. *l.* 40. *Yel.* 17. *Noy.* 11. 1 *Dan. Abr.* 26.

CHAPTER

CHAPTER XIV.

To Pay Money in Conſideration of Forbearance, or of Diſcharging, or Proving a Debt.

THE ſubject matter of the preſent chapter will be conſidered under the following heads:

1. *Of Agreements to Pay Money in Conſideration of Forbearance to ſue, &c.*

2. *Of Agreements to Pay Money in Conſideration of Returning Goods taken either in Execution, or under a Diſtreſs for Rent.*

3. *Of Agreements with Sheriffs or their Officers to Pay a Debt or Put in Bail, &c in Conſideration of their letting a Defendant out of Cuſtody, &c.*

4. *Of Agreements with Creditors to accept a Compoſition, &c.*

5. *Of Agreements to Pay Money in Conſideration of a Creditor's either Diſcharging his Debt, or his Debtor, and Delivering up Securities, &c.*

6. *Of Agreements to Pay a Precedent Debt in Conſideration of the Creditor's proving it upon Oath, or of the Debtor's Failure in proving it Paid, &c.*

1. *Of Agreements to Pay Money in Conſideration of Forbearance to ſue, &c.*

An action will lie upon a promiſe to pay a ſum of money in conſideration of giving time, or forbearing to ſue for a precedent debt or other cauſe of action. (*a*)

Thus, if *A.* is indebted to *B.* in 10*l.* and upon this *C.* promiſes that in conſideration that he will forbear *A.* till ſuch a day, and if *A.* does not pay him on that day, he himſelf will pay *B.* the 10*l.* on the ſame day, this is a valid promiſe, upon which *B.* may have an action againſt *C.*; for though *A.* had the whole day to pay it, and ſo it was impoſſible for *C.* to pay it the ſame day, if he did not pay it, yet the ſubſtance of the promiſe is to pay, and the time limited being impoſſible, is void, and then it ought to be paid on requeſt. (*b*)

So, where the defendant was indebted to the plaintiff in 10*l.* for ſo much money lent, and in conſideration that the plaintiff would not ſue him for the 10*l.*, he promiſed to deliver to the plaintiff ten quarters of barley upon requeſt. The plaintiff ſhowed that he did not ſue, &c. and that on ſuch a day he required the barley, but that the defendant refuſed to deliver it. In an action upon this *aſſumpſit*, it was adjudged for the plaintiff. (*c*)

So, if *A.* be indebted to *B.* in 100*l.* and *B.* is about to commence a ſuit for the recovery thereof, but *C.* a ſtranger comes to him and ſays, that if he will forbear him, he himſelf will pay it: this is a good conſideration for the promiſe, *B.* averring that he had abſtained and forebore to ſue *A. et adhuc* did abſtain and forbear, though no certain time was appointed for the forbearance; for it ſeems a perpetual forbearance is intended, the which he hath performed. (*d*)

So, if *A.* be indebted to *B.* and *C.* a ſtranger ſays to him, that if he will forbear him *per paululum temporis* that he himſelf will pay him; this is a good conſideration for an *aſſumpſit*, averring a certain time of forbearance. (*e*)

(*a*) Vide Com. dig. tit. Action on Aſſumpſit. *B.* 1.

(*b*) 1 *Rol. Abr.* 15. *pl.* 6. 1 *Bac. Abr. tit.* aſſumpſit *B.* Note, Such a promiſe muſt now be in writing. Vide ſtatute of frauds and perjuries ante *Vol.* 1. *c.* 4. *ſ.* 2. (*c*) 1 *Vin.* 322. *pl.* 1.

(*d*) 1 *Rol. Abr.* 27. *pl.* 45. 1 *Dan. Abr.* 55. *pl.* 45.

(*e*) 1 *Rol. Abr.* 27. *pl.* 46. 1 *Dan.* 55. *pl.* 46. *But ſee* 1 *Dan.* 51. *pl.* 25, 26. *and Com. Dig. tit. action on aſſumpſit B.* 1. contra.

So,

So, if *A.* is indebted to *B.* and *B.* cauſes him to be arreſted, and while he is under the arreſt, a ſtranger comes to *B.* and ſays, that if he will forbear *A. per paululum temporis* he will pay him, upon which *B.* ſuffers *A.* to go at large; this is a good conſideration for the promiſe, though he arreſts *A.* within an hour after; for the deliverance from the preſent danger is a good conſideration. (*f*)

So, in the caſe of *Cowlin* v. *Cook*, (*g*) the plaintiff declared that the defendant was bound to him in 100*l.* which he intended to ſue him for, and the defendant in conſideration that the plaintiff would defer the payment and not ſue him upon that bond, promiſed that he would pay him. It was objected that the conſideration was not good, for he might forbear and defer for a day only, &c. But the Court held it good; for the deferring ſhall be intended during all the life of the obligee; and that if he ſues him ſooner upon that bond, an action on the caſe lies; and ſo it was ruled in one *Barkenham*'s caſe. But if it had been *Quod deferret per paululum temporis*, it had not been good without putting a certain time.

So, in the caſe of *Waters* v. *Glaſſop*, (*b*) the plaintiff declared that the defendant's ſon was indebted to him in a ſum of money, and that he had a deſign to arreſt him for it; that the defendant, in conſideration that the plaintiff at the ſpecial inſtance and requeſt of the defendant would forbear to arreſt the defendant's ſon until after the 23d of *October*, the defendant aſſumed to pay to the plaintiff on or before the 23d of *October*, ſo much as the defendant's ſon ſhould be indebted to the plaintiff upon the balance of the account to be ſtated between the defendant's ſon and the plaintiff; and the plaintiff averred that an account was ſtated of all debts, owing by the defendant's ſon, to the plaintiff, and upon that account the defendant's ſon was found indebted to the plaintiff in 20*l.* and avers, that he forbore to arreſt the defendant's ſon, from the time of the promiſe *hucuſque*; and that the defendant did not pay the 20*l.* &c. Upon the trial a verdict was found for the plaintiff. But it was moved in arreſt of judgment; that the conſideration was not good; becauſe ſince the plaintiff was to forbear until after the 23d of *October*, and the defendant to pay the money on or before, it might be, that after the defendant had paid the

(*f*) 1 *Rol. Abr.* 27. *pl.* 47. 1 *Dan.* 55. *pl.* 47.
(*g*) *Ney* 83. *Lat.* 151. *S. C.* (*b*) 1 *Lord Raym.* 357.

money, the plaintiff would not perform his part, but arreſt the defendant's ſon before the time agreed by the promiſe. *Sed non allocatur.* For *per Curiam,* " the conſideration is well enough, for the defendant has to the laſt inſtant of the 23d of *October* to pay the money, and the next inſtant for forbearance the plaintiff has performed his part, for he is not bound to forbear but only one inſtant after the 23d of *October,* and therefore it is well enough."

So in *Harris* v. *Richards,* (*i*) which was an action of *aſſumpſit;* and the declaration ſtated that whereas one *Bond* was bound to the plaintiff in an obligation of 40*l.* for the payment of 20*l* ; and whereas the defendant was bound to one *Hodges* in an obligation of 100*l.,* dated 5th *February,* 19 *Jac.* 1. for the payment of 55*l.* the 5th *February* following, and the ſaid 20*l.* and 55*l.* being due and not paid, that the defendant the 1ſt of *February* 1624, which was in the 22d year of *James* the firſt, in conſideration the plaintiff would forbear the payment of the 20*l.* until 1627, and in conſideration the plaintiff would compound with the ſaid *Hodges* for the ſaid 50*l.* and the intereſt then due, and deliver the ſaid bonds into his hands aſſumed, to pay to him, the ſaid 20*l.* and the ſaid 50*l.* and all the intereſt which he ſhould pay or compound for; and alledges in fact, that he did forbear the ſaid 20*l.,* and upon the 1ſt of *March* 1624 paid the ſaid 50*l.* and 15*l.* for intereſt, and obtained the ſaid bond into his hands, and that upon ſuch a day, year, and place, he gave notice thereof to the defendant and required of him payment thereof, according to his promiſe, who had not paid it, and therefore he brought this action.

After verdict for the plaintiff, it was moved in arreſt of judgment, that this action lies not; for it is no lawful conſideration to pay intereſt. *Sed non allocatur,* " for it is to compound a forfeited bond, which is a good conſideration; alſo it is no unlawful conſideration to pay intereſt, not being more than is permitted."

The ſecond exception, was, that there was not any conſideration why the defendant ſhould pay the 20*l.,* for he had not any benefit thereby. *Sed non allocatur:* " for it is a ſufficient conſideration that the plaintiff at his requeſt would bear it."

So, in the caſe of *Daviſon* v. *Heſlop,* (*k*) which was an action of

(*i*) *Cro. Car.* 272. (*k*) 2 *Lev.* 20. *Raym.* 211. *S. C.* *aſſumpſit,*

aſſumpſit; and it was alledged that *Fenwicke* was indebted to the plaintiff for arrears of an annuity of 117*l.* and appointed the defendant then his receiver, to pay it out of the rents, due at *Martlemas* next enſuing; and that the plaintiff and defendant accounted, and thereupon it appeared, that 117*l.* was due to him. The defendant promiſed that if the plaintiff would forbear, he would pay it within a month after. For the plaintiff it was moved in arreſt of judgment, that it did not appear that the defendant received any rent at *Michaelmas*, and the appointment was to pay it only out of the rents due at *Martlemas*. But to this it was anſwered, that it ſhould be ſo intended now, the defendant having promiſed to pay it upon forbearance; and of this opinion were the court, and gave judgment for the plaintiff.

So, if *A.* ſues a writ of privilege (*l*) againſt *B.* and *B.* in conſideration that *A.* will at the requeſt of *B.* forbear further to proſecute the ſaid writ, promiſes 50*l.* to *A.* this is a good promiſe, though it be not averred that the plaintiff had any good cauſe of action; for the promiſe implies a cauſe, in as much as *B.* deſired a ſtay; this alſo requires a loſs of the writ, and loſs of the ſuit.

So, where a plaintiff ſued out a *capias ad reſpondendum*, (*m*) and after the return thereof, the defendant in conſideration the plaintiff would forbear further proſecution, promiſed to pay, &c. The court held this a good conſideration; and though the firſt return be paſt, yet an *alias* may be taken out; and judgment was given for the plaintiff.

So, in the caſe of *Jennings* v. *Harley*, (*n*) which was an action of *aſſumpſit*; and the plaintiff declared that whereas one *Baſſet* was indebted unto him in 50*l.* and that he brought *debt*, and had judgment to recover, and thereupon ſued out a *capias ad ſatisfaciendum*, and an *exigent* againſt *Baſſet*, who was thereupon outlawed, and that the plaintiff intended to ſue a *capias utlagatum*; that the defendant, in conſideration the plaintiff would forbear to proceed upon the *capias utlagatum* which he had ſued out, until Eaſter Term next following, promiſed that if *Baſſet* did not pay the debt, that he would pay it; and alleged in fact, a non performance of the promiſe. The defendant pleaded *non aſſumpſit*, which was found againſt him; and after a verdict for the plaintiff, it was moved in arreſt

(*l*) *Bedwell and Cotton*, *Hob.* 216. 1 *Dan.* 47. *pl.* 6.
(*m*) 2 *Keb.* 200. *pl.* 3. 1 *Vin. Abr.* 323. *pl.* 7.
(*n*) *Cro. Eliz.* 909. *Yel.* 19. *S. C.*

of judgment, that the action lay not; for this conſideration is againſt law, and alſo void, becauſe this proceſs is at the queen's ſuit and not at the party's. But *Gawdy*, *Fenner*, and *Yelverton*, held that the conſideration was good; for it is the party's ſuit as well as the *queen*'s; for the party is the means to entitle the queen thereto, and the party hath the ſpecial carriage thereof: and if the ſheriff ſuffer the party arreſted upon ſuch a *capias utlagatum* to eſcape, it is an eſcape againſt the plaintiff."

Popham, é contra: "For the ſuit is merely now the queen's ſuit, and a means whereby the party may have his execution. For as the queen is entitled thereto by the party, ſo, after the outlawry, the party is thereto by the queen, and that iſſueth for the contempt to the queen. And if the party will not take it, the queen's attorney may ſue it out; and the queen is not of right bound to ſatisfy the party out of the goods which are ſeized by this writ, although ſhe doth it out of grace many times. But a petition of right lieth not in ſuch caſe: and although the plaintiff hath advantage thereof, in regard of the party who is taken thereby to be in execution (which is the reaſon that he may have debt upon the eſcape) yet he cannot ſtay the execution of this writ, ſo the conſideration is void."

But notwithſtanding, the other judges gave rule, that if other matter were not ſhown before ſuch a day, judgment ſhould be entered for the plaintiff, and that the defendant might bring his writ of error. And no cauſe was afterwards ſhown, &c.

So, if *A.* exhibits a bill in *Chancery* (*o*) againſt *B.* ſuppoſing thereby that he had delivered 300*l.* to *B.*, in truſt, upon which *B.* in conſideration, that *A.* would end all ſuits againſt him in *Chancery*, promiſes to pay him 100*l.*; in this caſe though *A.* has remedy for it at *common law* by writ of *account*, yet this is a good conſideration, ſo as to have an action upon the caſe upon the *aſſumpſit*, becauſe the money was delivered in truſt, which is proper for the *Chancery*, and the ſuit there is a matter of charge.

So, if *A.* promiſes *B.* in conſideration that he will not ſue an attachment out of *Chancery* (*p*) upon a decree which is there againſt him, that then he will pay 20*l.* (it ſeems it is intended that the decree was at his ſuit) this is a good conſideration to maintain an

(*o*) 1 *Dan.* 46. *pl.* 5. *Raym*, 372. 1 *Rol. Abr.* 30. *Y. pl.* 1. 1 *Dan. Abr.* 55. *pl.* 43.

(*p*) *Cro. Eliz.* 768.

action

action upon the caſe, for hereby ſhall he avoid the impriſonment of his body, of which the *Chancery* had power for the contempt of the decree.

If an heir be bound by a bond of his anceſtor, and has aſſets; and in conſideration that the obligee will forbear to ſue him, he promiſes to pay the money due thereon, an action of *aſſumpſit* will lie upon this promiſe: but if the heir is not bound by the bond, no action is maintainable.

Thus, in the caſe of *Barber* v. *Fox*, (*q*) which was an action of *aſſumpſit*, and the declaration ſtated, that whereas one *Anthony Fox*, the father of the defendant by his writing obligatory became bound to the plaintiff in 92*l.* 12*s.* upon condition to pay him 51*l.* 16*s.* at a certain day, paſt, which was not paid, and ſo the obligation became forfeited, and afterward *Anthony Fox*, the father, died, and the defendant was his ſon and heir; wherefore the plaintiff intended to ſue the defendant as ſon and heir on the ſaid bond; and the defendant having notice of it, in conſideration that the plaintiff, at the ſpecial inſtance and requeſt of the defendant, would forbear his intended ſuit againſt the defendant as ſon and heir on the ſaid bond, undertook and promiſed the plaintiff to pay him the ſaid 51*l.* 16*s.* on requeſt; and the plaintiff averred forbearance, and yet the defendant had not paid the ſaid money, although on ſuch a day and year he was requeſted, &c. On *non aſſumpſit* pleaded, a verdict was found for the plaintiff. But it was afterwards moved in arreſt of judgment, that there was no conſideration; for it does not appear that the defendant was ſueable upon this bond as ſon and heir, for it is not ſhown that *Anthony Fox*, the defendant's anceſtor, whoſe ſon and heir he is (had bound himſelf and his heirs, by the ſaid bond; and if the heir is not bound expreſsly by name, he is not bound at all; and therefore here was no conſideration to found this promiſe; wherefore judgment was ſtaid until it ſhould be moved on the other ſide.

And afterwards *Saunders*, for the plaintiff, moved for judgment, and ſaid, "that though the declaration would have been bad on demurrer, yet is now made good by the verdict; for the jury have found that the defendant was bound as heir in the ſaid bond, for otherwiſe there was no conſideration; and they

(*q*) 2 *Saund.* 136.

ought

ought to have found that the defendant did not undertake, &c. if there was no conſideration, or otherwiſe they might be attainted for a falſe verdict; but they having found, that the defendant did undertake and promiſe as the plaintiff has declared, it ought of neceſſity now to be intended that *Anthony Fox* had bound himſelf and his heirs by the ſame bond."

Sed non allocatur; for by the court, "though they would intend a perſonal lien againſt an executor, if he has aſſets in his hands, though it be not averred, yet they will not intend a real lien againſt an heir; though he be bound by the bond of his anceſtor, unleſs it is expreſsly alleged; and therefore they would not intend it here, though it be after verdict; wherefore judgment was arreſted."

The learned editor of *Saunder's* Reports, in a note upon this caſe, ſhows a clear diſtinction between the liability of an heir and an executor upon a promiſe to pay the debt of the anceſtor or teſtator: and he brings together the different caſes on this ſubject.—The note is as follows: "But where a father being indebted to *J. S.* in 100*l.* by bond, made a fraudulent deed, and thereby gave all his goods to his ſon, and died, and upon a converſation had concerning the fraudulent deed, the ſon promiſed *J. S.* in conſideration he would deliver the bond to him, and make an acquittance and diſcharge to him of the debt, to pay him the 100*l.* and an action having been brought thereon, and a verdict for the plaintiff, it was moved in arreſt of judgment, that the conſideration was not good, becauſe it did not appear that the ſon was liable to the payment of the debt, either as heir, or executor, or adminiſtrator, or executor of his own wrong; and therefore delivering the bond, and making the acquittance or diſcharge to him was not good. But it was anſwered and reſolved, that the conſideration was good; and it ſhould be intended that he was liable, or at leaſt that the diſcharge was made to the party who was liable, for the plaintiff promiſed to diſcharge the debt, and that ſhould be intended to be made to the party who was liable to the payment of it, or elſe it would be no diſcharge. 1 *Sid.* 31. *pl.* (9) If that was in truth, a fraudulent deed of gift of the goods by the father to the ſon as ſtated in the caſe, the ſon, after his father's death, would be chargeable for this debt as an executor of his own wrong, though poſſeſſion of the goods had been delivered to him at the time of the deed. For it is holden, that if a man makes a fraudulent gift of his goods in his lifetime to ouſt his

his creditors of their debts, the vendee after his death ſhall be charged for them. 1 *Rol. Abr.* 549. *pl.* 3. And the only way in which he can be ſo charged is, as executor of his own wrong, 2 *Leon.* 223 *Stamford's caſe. Cro. Jac.* 271. *Hawes* v. *Leader. Yelv.* 197. *S. C.*; where it is ſaid, that the goods are liable to the creditors in the hands of the vendee, as an executor of his own wrong, if the deed of gift be fraudulent. And the reaſon is, becauſe every intermeddling without authority, after the death of the party, makes the perſon ſo intermeddling an executor of his own wrong. *Dyer* 166. *b. Stoke's caſe.* And the ſame point was recognized in the caſe of *Edwards* v. *Harben*, 2 *Term Rep.* 587*. where it is adjudged, that, if a creditor takes an abſolute bill of ſale of the goods of his debtor which is fraudulent againſt creditors, and the debtor dies, and thereupon the vendee takes and ſells the goods, he is liable to be ſued as executor of his own wrong for the debts of the deceaſed. Hence it ſeems to follow, that the ſon was in the caſe in 1 *Sid.* liable to the payment of the debt, at leaſt to the extent of the value of the goods, as executor of his own wrong, and therefore the delivering of the bond to him, and giving him an acquittance, appears to be a ſufficient conſideration to ſupport his promiſe. For which reaſon that caſe ſeems to differ materially from the principal one. So where in *aſſumpſit* the plaintiff declared that the defendant's father bound himſelf to the plaintiff in the ſum of 400*l.* for the payment of 200*l.*, and that the father was dead, and the defendant was his ſon and heir, to whom the plaintiff intimated that he intended to ſue him as heir for the debt, and thereupon the defendant in conſideration of forbearance promiſed to pay, &c., and upon *non aſſumpſit* pleaded, and a verdict for the plaintiff, it was moved by *Twiſden*, Serjeant, in arreſt of judgment, becauſe it was not ſaid, that the father bound himſelf and his heirs, and therefore it did not appear, that the defendant was liable to an action, and ſo the conſideration was void. But it was adjudged that it ſhould be intended, it being found by the jury, according to *Hob.* 216. *Bidwell* v. *Catton*, and the plaintiff had judgment, (but otherwiſe between *Barber* and *Fox*, *Trin.* 22. *Car.* 2. *K. B.*) *St. Paul* v. *Earl of Rivers*, *Trin.* 1656, *K. B.* cited in *Sir T. Raym.* 128. But this caſe being afterwards cited in *Hunt* v. *Swain*, 1 *Lev.* 165. *S. C. Sir T. Raym.* 127. 1 *Sid.* 248. the court paid no regard to it, and *Twiſden*, Juſtice, ſaid, he was counſel in it and it was at the time taken to be a hard caſe. The

* *Et Vide ante Vol.* 1. *p.* 545.

caſe

caſe of *Hunt* v. *Swain*, was *aſſumpſit* againſt the heir on a promiſe, in conſideration, the plaintiff would forbear him until *Michaelmas* to pay. After verdict for the plaintiff, judgment was ſtayed, becauſe it did not appear that the anceſtor bound himſelf and his heirs, and the conſideration was not to forbear generally, but to forbear him who did not appear to be chargeable; but it was agreed that if the declaration had been that *J. S.* was indebted to him and died; and the defendant being his executor promiſed, &c. as before, it would have been good; becauſe an executor is liable without expreſs words; whereupon the plaintiff perceiving the judgment of the court to be againſt him, prayed *nil capiat per billam* with an intent to commence a new action.

It is a principle of law that an executor does more actually repreſent the perſon of his teſtator, than the heir does the perſon of his anceſtor: for if a man binds himſelf his executors are bound, though they are not named; but it is not ſo of the heir. *Co. Litt.* 209. *a.* And as it is not ſtated in the principal caſe, that the anceſtor of the defendant bound himſelf and his heirs, without which there is no cauſe of action againſt the defendant, the declaration is defective in omitting ſo material an allegation; and therefore the verdict does not cure it. For though a verdict will cure a title which is imperfectly or defectively ſtated, yet, if the declaration ſtates either a defective title, or totally omits to ſtate any title or cauſe of action at all, a verdict will not cure ſuch a defect. See 1 *Saund.* 228. *c. Stennel* v. *Hogg.* It ſeems therefore that the deciſion of the court in this caſe is well founded. Indeed, it has been ſaid, that if a man binds himſelf and his heirs in a bond, and dies, and after the obligee ſues the heir, who has no aſſets deſcended to him, upon the bond, and the heir in conſideration that the plaintiff will not ſue him, promiſes to pay the money, this is no conſideration to maintain an *aſſumpſit*; becauſe the defendant was not chargeable without aſſets. 1 *Roll. Abr.* 28. *pl.* 57. Lord *Gray's* caſe; but it ſhould ſeem that this would not now be ſo conſidered; for in the principal caſe it appears that the verdict was founded upon the want of alleging in the declaration that the anceſtor had bound himſelf and his heirs; and if the heir had been liable, it ſeems to follow that forbearance would have been adjudged a ſufficient conſideration to ſupport the promiſe without regarding whether he had aſſets or not at the time. And in Lord *Gray's* caſe, if the defendant had not any aſſets he ought to have pleaded it to the action upon the bond: but, if inſtead of ſo doing, he deſires the obligee to forbear his ſuit, and in conſideration

tion thereof promiſes payment, that appears to be a ſufficient conſideration: for though the forbearance may be of no benefit to the defendant, it might have been attended with a loſs to the plaintiff not to proceed in his ſuit. So the promiſe of an heir, in conſideration of forbearance of a ſuit in *Chancery*, to which he was not liable, will not ſupport an *aſſumpſit*; as where in *aſſumpſit* the declaration ſtated that there were controverſies between him and the defendant, for the profits of certain lands, which the defendant's father had taken in his life-time; and that he had purchaſed a writ out of *Chancery* againſt the defendant, to the intent to exhibit a bill againſt him. Upon the return of the writ for the ſaid profits, the defendant, in conſideration he ſhould ſurceaſe his ſuit, promiſed that if he could prove that his father had taken the profits, or had poſſeſſion of the land under the title of the plaintiff's father, he would pay for the profits of the land, and averred that he had ſo proved it; and upon *non aſſumpſit* it was found for the plaintiff: but judgment was afterwards given for the defendant; for by the *Court* it is no conſideration; for if the father of the defendant did take the profits, that is no reaſon why his ſon ſhould anſwer for them; and therefore the ſuit is unjuſt, and the ſtaying of it no conſideration. But if the ſuit had been for evidences, or otherwiſe, the ſtaying of it had been a good conſideration: and beſides, the plaintiff did not allege that he was heir or executor, and ſo had no colour to charge him; and if it had been ſo alleged, yet it was no cauſe to charge him for a perſonal *tort*. *Cro. Eliz.* 206. *Tooley* v. *Windham*.

But with reſpect to executors, if a creditor forbears, at their requeſt, to ſue them, that is conſidered as a ſufficient conſideration to charge them *de bonis propriis*, whether they had aſſets or not at the time of the promiſe; and therefore it is not neceſſary to aver in the declaration that they had aſſets. As if *A.*, to whom the teſtator was indebted, comes to the executor, and ſays that he intends to ſue him for the debt, whereupon the executor promiſes, in conſideration that the plaintiff will forbear him for a reaſonable time, to pay him, and *A.* accordingly forbears to ſue him for a reaſonable time, that is a good conſideration to charge the defendant in an action upon the caſe, out of his own eſtate, without aſſets; for by this promiſe it is intended, as well to forbear to ſue the executor as to forbear the debt; and a forbearance of a ſuit is a good conſideration without aſſets, at the time of the promiſe. 1 *Roll. Abr.* 24. pl. 33. upon a demurrer, where the defendant

defendant pleaded that he had no aſſets when the promiſe was made. So if a man declares upon a promiſe againſt an adminiſtrator that the inteſtate was indebted to him in 10*l.* by bond, and died, and the defendant being his adminiſtrator, in conſideration of the premiſes, and that the plaintiff would ſpare him till ſuch a time after, promiſed to pay him the debt, and avers that he ſpared him till the time, and the defendant had not paid him, &c. though he did not ſay that he would ſpare him the debt, or to ſue him, yet it ſhall be ſo intended, and therefore the conſideration is good. 1 *Roll. Abr.* 15. pl. 3. So it was ſaid by *Hale*, Ch. J. that though a bare accounting by the executor with a creditor of his teſtator will not bind the executor to pay *de bonis propriis*, yet a promiſe in conſideration of forbearance will. 2 *Lev.* 122. *Hawes* v. *Smith.* Alſo where the plaintiff having a debt owing to him from the teſtator on a ſimple contract, the executor, in conſideration the plaintiff would forbear to ſue him until ſuch a time, promiſed to pay, and the plaintiff averred that he did forbear accordingly, this is a good promiſe: but if the heir had promiſed, on forbearance of the ſuit to pay this debt, no *aſſumpſit* would have lain againſt him, becauſe without conſideration; for the heir is not chargeable to any debt without *ſpecialty*. *Yelv.* 55, 56. *Fiſh* v. *Richardſon*, *Cro. Jac.* 47. *S. C.* So where in *aſſumpſit* the plaintiff declared that *J. C.* deviſed a legacy to him, and made the defendant executor, and the plaintiff intending to ſue him for the legacy, the defendant, in conſideration of forbearance, promiſed to pay him; the defendant pleaded divers bonds and judgments, and no aſſets *ultra*; upon which the plaintiff demurred, and had judgment without argument; for it is not material whether he had aſſets or not; for he is charged upon his own promiſe, in conſideration of forbearance; and a forbearance of a ſuit for a legacy is a ſufficient conſideration. 2 *Lev.* 3. *Davis* v. *Regner*, *S. C.* 1. *Vent.* 120. 2 *Keb.* 758. in which laſt book it is ſaid, that if it had appeared by the declaration that the plaintiff had no cauſe of action, the forbearance would not be ſufficient. So if *A.*, together with *B.*, is bound to *C.* for the proper debt of *B.*, and *A.* pays the money, and *B.* dies, and makes *D.* his executor, and *D.*, in conſideration that *A.* will forbear to ſue him until ſuch a time, promiſes to pay him, this is a ſufficient conſideration to ſupport the promiſe. 1 *Sid.* 89. *Scott* v. *Stevens.* So if an executor be indebted to *J. S.* in 100*l.* who demands the money, the executor is chargeable only in reſpect of aſſets, and not

not otherwiſe: but if he promiſes to pay the debt at a future day, it becomes his own debt, and to be ſatisfied out of his own eſtate. *Yelv.* 11. *Goring* v. *Goring.* See *Cro. Eliz.* 91. *Trewinian* v. *Howell*, 1 *Vez.* 126. *Reech* v. *Kennegal.* However, though the executor ſhould promiſe upon a ſufficient conſideration to pay, yet his promiſe is not binding upon him by the ſtatute of frauds. 29 *Car.* 2. *c.* 3. *ſ.* 4. unleſs it be in writing. See 1 *Saund.* 210, 211. *Forth* v. *Stanton*, notes 1, 2.* But a bare promiſe to pay by the executor does not make him liable to anſwer out of his own eſtate; but he is ſtill chargeable only as executor, and to the extent of the aſſets in his hands, in the ſame manner as he would have been had no ſuch promiſe been made: and it makes no difference though the executor had made ſuch promiſe in writing. This point was fully eſtabliſhed in *Rann* v. *Hughes*, both in the Exchequer Chamber and Houſe of Lords. 7 *Term Rep.* 350. note (*a*) 7. *Brown*, P. C. 566. S. C. †

Upon the principle that a promiſe, in conſideration of forbearance to ſue where there is no cauſe of action, is void, it has been determined, that where a married woman gave a promiſſory note as a *feme ſole*, but after her huſband's death promiſed to pay it in conſideration of forbearance to ſue, no action lies on ſuch a promiſe; becauſe the note being void, no cauſe of action exiſted againſt her at the time of making the promiſe.

Thus, in the caſe of *Loyd* v. *Lee*, (*r*) a married woman gave a promiſſory note as a *feme ſole*; and, after the huſband's death, in conſideration of forbearance, promiſed to pay it; and it was contended, that though ſhe being under coverture at the time of giving the note, it was voidable for that reaſon, yet, by her ſubſequent promiſe when ſhe was of ability to make a promiſe, ſhe had made herſelf liable; and the forbearance was a new conſideration. But *Pratt*, Ch. J. held the contrary, and "that the note was not barely voidable, but abſolutely void; and forbearance, where originally there is no cauſe of action, is no conſideration to raiſe an *aſſumpſit.*" But he ſaid it might be otherwiſe where the contract was but avoidable.

So, if an infant enters into an obligation for a certain ſum of money, and afterwards the obligee brings debt upon the obligation, and procures a *latitat* to arreſt him, and the obligor being of full age, and having notice thereof, comes to the obligee, and ſays

* *See alſo ante* 1 *Vol. p.* 48. † *Et ante Vol.* 1. *p.* 49. &c. (*r*) 1 *Stra.* 94.

to

to him, that if he would not arreſt him he would pay him the money, this is not any conſideration to maintain an action, inaſmuch as the infant might have avoided the obligation by plea. (*s*)

So, if an infant takes up certain commodities of a mercer in *London*, at a certain price, who afterwards, for non-payment of the money, threatens to ſue him, and the mother of the infant promiſes to pay him if he will not ſue her ſon, this is not any conſideration to maintain the action, inaſmuch as the infant was not by law chargeable for the money. (*t*)

So, if *A.* be indebted to *B.* by bill, and *B.* is indebted to *C.*, and *B.*, in recompence of his debt due to *C.*, aſſigns the bill of *A.* to him, and, before the day of payment of the money, *A.* comes to *C.* and promiſes him that if he will forbear him the payment of the money for a week, that then he will pay him; upon which *C.* forbears him; yet this is not any conſideration to maintain an action upon this promiſe; becauſe, notwithſtanding the aſſignment of the bill, yet the property of the debt remained always in the aſſignor. (*u*)

But if *A.* is indebted to *B.* in 20*l.*, and thereupon *B.* makes a letter of attorney to *C.* to put him in ſuit, and to recover the debt to his own uſe, and to releaſe it at his pleaſure, and after *A.*, in conſideration that *C.* will forbear to ſue him for a certain time, promiſes *C.* to pay the debt, this is a good conſideration; for the forbearance of the ſuit whereof he had power, is a meritorious conſideration. (*v*)

(*s*) 1 *Rol. Abr.* 18. *l.* 50. 1 *Dan.* 46. *pl.* 2. *Cro. Eliz.* 700. *But ſee Dy.* 272. *b. marg. Cro. Eliz.* 127. 1 *Leon* 110. contra.

(*t*) *Dan. Abr.* 46. *pl.* 1.

(*u*) 1 *Vin. Abr.* 304. *pl.* 12. *See alſo* 1 *Saund.* 210. *n.* 1. 1 *Rol. Abr.* 20. *l.* 20. 1 *Ventr.* 154. *Hard.* 74. *Moor.* 701. *Cro. Eliz.* 653. 2 *Rol. Abr.* 26. *l.* 30.

(*v*) 1 *Rol. Abr.* 20. *pl.* 11. 1 *Vin. Abr.* 304. *pl.* 11. 1 *Saund.* 210. *n.*

2. *Of Agreements to pay Money in Conſideration of Returning Goods taken in Execution, or under a Diſtreſs for Rent.*

An action will lie on a promiſe to pay a precedent debt, in conſideration that a ſheriff's officer would reſtore goods taken in execution under a *fieri facias* upon a judgment for the ſame debt.

Thus, in *Love*'s caſe, (*w*) the ſheriff takes goods in execution upon a *fieri facias*; a ſtranger promiſes to the officer to pay him the debt, in conſideration he would reſtore them. Upon demurrer this was argued, and compared to a conſideration of ſuffering a priſoner to eſcape.* *Sed non allocatur*, "for by the *capias* he is to take and keep in *ſalva cuſtodia*; and to give liberty is contrary to the writ, but that is now to raiſe the money, and the ſheriff, upon a *fieri facias* may ſell the goods, and this is no more in effect."

So, in the caſe of *Byne* v. *Playne*, (*x*) where the plaintiff declared that he had recovered againſt *W.* 20*l.* in the Court of S., and had a *levari facias* to the bailiff there, to make execution of the goods of *W.*; and whereas he was ready ſo to do, the defendant promiſed the plaintiff, that in conſideration he would deliver the defendant the ſaid goods, he, within fourteen days after *Michaelmas*, would pay the plaintiff the 20*l.* or otherwiſe re-deliver to the plaintiff the ſaid goods, if, in the mean time, no other makes title to them, and proves them to be his own goods (and averred that none made title to them within that time). A ſpecial verdict found the recovery and *aſſumpſit*; but further, that before the recovery, *W.* was poſſeſſed of thoſe goods, as his own proper goods, and by indenture ſold them to *R.*, his brother, for money, with a promiſe that *W.* notwithſtanding ſhould have the poſſeſſion for four years, not yet expired, he to pay to *R.* 20*s.* a year; and that if the ſaid *W.*, at the end of the four years, ſhould repay the ſaid money, the ſale ſhould be void; and that the ſaid *R.* made title the ſaid goods by virtue of that ſale, this is a good promiſe, though *W.* had only a ſpecial property in theſe goods, and though they were not liable to the execution; for the plaintiff having the poſ-

(*w*) 1 *Salk.* 28. *Vide* Pullen v. Stokes, 2 *H. Blac.* 312.
* *Vide Poſt*, 435.
(*x*) 1 *Vin. Abr.* 328. *pl.* 1. *Cro. Eliz.* 28. *S. C.*

ſeſſion of the goods, his delivery of them to the defendant is a good conſideration; and judgment was given for the plaintiff.

So, where a landlord is about to diſtrain the goods of his tenant for arrears of rent, and a third perſon promiſes, in conſideration that the landlord would deſiſt from diſtraining, he would pay the arrears, this is a good conſideration, and the promiſe need not be in writing.

Thus, in the caſe of *Williams* v. *Leper*, (*y*) one *Taylor*, a tenant to the plaintiff, being three quarters of a year in arrear for rent, (which amounted to 45*l.*) and being inſolvent, conveyed to his creditors all his effects, for the benefit of his creditors. They employed *Leper*, the defendant, as a broker, to ſell the effects; and accordingly he advertiſed a ſale. On the morning of the ſale, *Williams*, the landlord, came to diſtrain the goods in the houſe. *Leper* having notice of the plaintiff's intention to diſtrain them, promiſed to pay the ſaid arrear of rent, if he would deſiſt from diſtraining; and he did thereupon deſiſt.

The queſtion was, whether the action could be maintained, the promiſe not being in writing.

The Court reſolved that the action was maintainable, the caſe not being within the ſtatute of frauds and perjuries: and Lord *Mansfield*, Ch. J. ſaid, "The landlord had a legal pledge. He enters to diſtrain: he has the pledge in his cuſtody. The defendant agrees, "that the goods ſhall be ſold, and the plaintiff paid in the firſt place." The goods are the fund: the queſtion is not between *Taylor* and the plaintiff. The plaintiff had a lien upon the goods; *Leper* was a truſtee for all the creditors, and was obliged to pay the landlord, who had the prior lien. This has nothing to do with the ſtatute of frauds: it is rather a fraud in the defendant to detain the 45*l.* from the plaintiff, who had an original lien on the goods."

(*y*) 3 *Bur.* 1886. *Vide* Ante, *vol.* 1. *p.* 61.

3. *Of*

3. *Of Agreements with Sheriffs and their Officers to pay a Debt, or put in Bail, &c. in Conſideration of their letting a Defendant out of Cuſtody, &c.*

A promiſe to a gaoler to pay the plaintiff's debt, in conſideration that he, the gaoler, would ſuffer a defendant, who was in execution, to go at large, is void.

Thus, in the caſe of *Martyn* v. *Blithman*; (z) the caſe was as follows: Dr. *Holman* was in execution in *Plymouth* for 31*l.* at the ſuit of *D.*, which was recovered there, before the mayor, &c. *Blithman* came to the gaoler, *Martyn*, and promiſed that, in conſideration he would ſet and ſuffer *Holman* to go at large, that the 31*l.* ſhould be brought into court there by *Holman*, by ſuch a day, to ſatisfy *D.*, and that he would ſave *Martyn*, the gaoler, harmleſs from this enlargement. *D.* recovered againſt *Martyn* on the eſcape, and afterwards *Martyn* brought *aſſumpſit* againſt *Blithman* on the promiſe, and declared upon the promiſe *ut ſupra*: and it was adjudged againſt the plaintiff; for the conſideration is againſt law, viz. to ſuffer one in execution to eſcape.

So, an agreement in writing to put in good bail for a perſon arreſted on *meſne proceſs*, at the return of the writ, or ſurrender the body, or pay debt and coſts, made by a third perſon with the bailiff of the ſheriff, in conſideration of his diſcharging the party arreſted, is void by the ſtatute 23 *Hen.* 6. *c.* 9.

Thus, in the caſe of *Rogers* v. *Reeves*, (a) which was an action of *aſſumpſit*; the facts were as follow: "*Richard Stephens* was arreſted by the plaintiff by virtue of a *latitat*, and a warrant thereon granted againſt him, at the ſuit of *J. Torriano*, and was diſcharged by the plaintiff on the following undertaking of the defendant:

"In the *King's Bench*. *J. Torriano*, gent. againſt *Richard* "*Stephens*. Returnable on *Thurſday* next, after eight days of "Saint *Hilary*. Damages 40*l.*; bail for 35*l.* 7*s.* *Theakſtone* by "*Evans*, attorney. I do hereby undertake to put in good bail, "on or before the return, or ſurrender the body to Mr. *S. Rogers*,

(z) *Yelv.* 197. (a) 1 *Term Rep.* 418.

" one of the officers to the sheriff of *Surry*, or on default pay " debt and costs. Dated 24th of *December*, 1782.

" *S. Reeves.*"

That the plaintiff was afterwards compelled to pay to the said *J. Torriano* 44*l.* for debt and costs, by virtue of an attachment issued against the sheriff.

The Court determined that this undertaking was void by the stat. 23 *Hen.* 6. *c.* 9. and that no action could be maintained upon it.

Ashhurst, J. said, " The statute in this case having prescribed the form of security, and having declared that all others shall be void, the security must be in that particular form marked out by the statute. The constant usage since the passing of the act of the 23 *H.* 6. has been, to take security by bond: but this is only a simple contract, and not of so high a nature as the security which was intended by the statute: that alone is decisive."

Buller, J. " This undertaking is void, considered in every point of view. The cases respecting executions of *fieri facias*, or persons in execution on *capias ad satisfaciendum*, do not affect this question; because the statute speaks only of persons arrested on *mesne* process. The statute of the 23 *Hen.* 6. requires the bond to be given as such for the appearance of the party, and for no other purpose. And it is admitted, that if there be any other condition expressed in the bond, it is void. This is bad therefore on both grounds; for, first it is not given to the sheriff himself; and it is for something independent of the appearance of the defendant.

The statute does not authorize sheriffs' bailiffs to take obligations for the appearance of persons arrested, as was contended by the counsel for the plaintiff. It expresly mentions the bailiff of a franchise, and only means those officers who have the return of process: for where the process is directed to the sheriff, the indemnity must be to him."

4. *Of Agreements with Creditors to accept a Composition, &c.*

If a person, who is insolvent, executes a deed of composition, by which he assigns all his effects (in trust) for the benefit of his creditors,

ditors, who covenant to releaſe him of all debts, &c. it is a diſcharge not only of debts actually due at the time of executing the deed, but alſo of all bills outſtanding, but payable at a future day.

Thus, in the caſe of *Holmer* v. *Viner*, (*b*) which was an action brought to recover the amount of two bills of exchange: the firſt was dated the 15th of *March* 1791, and drawn by one *William Hunt*, on the defendant, in favour of the plaintiff, for 229*l.* twelve months after date; the ſecond was between the ſame parties, and dated the 22d *March*, 1791, for 122*l.* The circumſtances of the caſe, as given in evidence, were, that *Hunt*, the drawer of the bills, being, in *March*, 1791, indebted to the plaintiff, and unable to pay him, the plaintiff inſiſted on his procuring ſome ſecurity; that *Hunt*, in conſequence, prevailed on the defendant to become ſuch ſecurity, by accepting the two bills in queſtion; but at the ſame time informed the plaintiff that the defendant owed him nothing, but had accepted the bills merely to accommodate him. Between the month of *March*, when the bills were given, and the month of *June* following, the defendant became indebted to *Hunt* in 185*l* and to the plaintiff in 81*l.* for goods ſold. In the ſame month of *June*, the defendant's affairs became embarraſſed, and *Hunt* was about to make him a bankrupt; but the plaintiff prevailed on him not to do ſo, but to make the defendant execute an aſſignment of all his effects to truſtees, for the benefit of his creditors at large. On the 2d of *July* a deed for that purpoſe was prepared and executed by the defendant. The plaintiff, together with *Hunt* and one *Roper*, were appointed truſtees; and it was executed by the reſt of the creditors. The truſtees under the deed of aſſignment poſſeſſed themſelves of all the defendant's effects, for the benefit of the creditors. At the time of executing the deed, the plaintiff was in poſſeſſion of the two bills of exchange in queſtion, accepted by the defendant, but he proved neither of them under the deed, but ſigned only as a creditor for 81*l.* which was the amount of the debt due to him by the defendant for the goods ſold.

Lord *Kenyon*, Ch. J. ſaid, "That though the bills were not due at the time when the deed was ſigned, there was a ſubſiſting debt then due to the plaintiff, by the defendant, as the acceptor

(*b*) 1 *Eſp. Rp.* 131.

of theſe bills of exchange; and though they had ſome time to run, they might, nevertheleſs, have been claimed againſt the defendant's eſtate, in the ſame manner as bills of exchange are proveable under a commiſſion of bankrupt by ſtatute 7 *Geo.* 1. *c.* 31., by allowing a rebate of intereſt; that it was not to be allowed, that a party having ſeveral demands againſt an inſolvent perſon ſhould ſplit thoſe demands, and come in under the compoſition deed for part, and ſue for the remainder at a ſubſequent time; that ſuch would be a fraud upon the other creditors, and defeat the very object of the compoſition, which was intended by the creditors to diſcharge the inſolvent from all his debts, as well as be an oppreſſion of the debtor, who had given up all his property to conſtitute a fund for their benefit. His lordſhip therefore ſaid, "that he was clearly of opinion, that as the bills upon which the preſent action was brought had been in the plaintiff's poſſeſſion when he executed the deed of compoſition, that if he meant to have claimed them againſt the defendant, he ſhould have made them part of his demand againſt his eſtate, as aſſigned; and that not having done ſo, and having executed the deed, he was thereby completely barred as to any right of ſuing on the bills."

So, when a creditor agrees to take a compoſition from his debtor, on the faith of which the debtor executes a deed of aſſignment of all his property to a truſtee, for the benefit of his creditors, ſuch creditor ſhall not be allowed, by refuſing to execute ſuch deed, to ſue his debtor for the whole of his demand.

Thus, in the caſe of *Butler* v. *Rhodes*, (*c*) where it appeared that the defendant's affairs having become embarraſſed, he had propoſed to his creditors to pay them a compoſition of 10*s.* in the pound; and for that purpoſe, to execute an aſſignment of all his effects to truſtees, for their benefit; that the plaintiff, among others, having been applied to, had conſented to accept the compoſition, and had ordered a draft of the deed of aſſignment to be ſent to his attorney, for his peruſal, which had been done, and his attorney had accordingly peruſed and approved it on his behalf; that, in conſequence of this ſuppoſed acquieſcence of the plaintiff, the deed had been prepared and executed by the defendant, who thereby had aſſigned to the truſtees all his effects, for the benefit

(*c*) 1 *Eſp. Rep.* 236.

of

of his creditors, who had conſented to receive a compoſition; but that, notwithſtanding the plaintiff had ſo given his aſſent as before ſtated, he had refuſed to execute the deed, and now had brought this action to recover the whole of his demand.

Theſe facts, as alſo the draft, as approved by the plaintiff's attorney, and the deed, were given in evidence.

Lord *Kenyon*, Ch. J. ruled, "that this evidence was a complete anſwer to the plaintiff's action. He ſaid, the principle upon which the action could not be maintained was, that in conſequence of this act of the plaintiffs, the defendant had parted with all his property, and the other creditors had been induced to execute the deed; that this was putting the defendant into a very awkward ſituation, as, by aſſigning all his property, he was committing an act of bankruptcy; that it therefore never ſhould be allowed to the plaintiff to recede from what he had undertaken, and to evade the effect of the compoſition, by a refuſal to execute the deed which had been prepared with his conſent. He therefore directed the jury to find for the defendant."

So, where a compoſition deed is entered into by an inſolvent, with a clauſe, that if certain creditors do not ſign the deed, it ſhall be null and void; if ſuch creditors accept of the compoſition, or a ſecurity for the payment thereof, though they do not ſign the deed, the debtor is diſcharged. (*d*)

But a mere agreement between a debtor and his creditors, that they will accept a compoſition in ſatisfaction of their reſpective debts, to be paid in a reaſonable time, cannot be pleaded to an action brought by one of the creditors to recover his whole demand.

Thus, in the caſe of *Heathcote* and others v. *Crookſhanks*, (*e*) which was an action of *aſſumpſit* on a promiſſory note, and for money had and received. The defendant pleaded, that on the 1ſt of *June*, 1785, he was indebted to the plaintiffs in the ſum of 18*l.* 14*s.* and was alſo indebted to divers other perſons, (naming them, in certain other large ſums of money reſpectively: and the ſaid defendant, being ſo indebted as aforeſaid, was unable to pay and ſatisfy to them the full amount of the ſaid ſeveral debts,

(*d*) Jolly *and others* v. Wallis, 3 *Eſp. Rep.* 228.

(*e*) 2 *Term Rep.* 24. *See alſo* Lynn v. Bruce, 2 *H. Bl.* 317. 1 *Vin. Abr.* 321. *S. P. But ſee* 1 *Bos. and Pul.* 250.

whereof the ſaid plaintiffs, and ſeveral other creditors of the ſaid defendant, then and there had notice; and thereupon, on, &c. for the compounding of the debts of the ſaid defendant, it was agreed between the ſaid plaintiffs and the ſaid other creditors before mentioned, and the ſaid defendant, that they, the ſaid plaintiffs and the ſaid other creditors, ſhould and would accept the payment of 5*s.* 6*d.* in the pound, on the amount of their reſpective debts, ſuch payment to be made within a reaſonable time, in full ſatisfaction and diſcharge of ſuch their debts. And the ſaid defendant avers, that he, in purſuance of the ſaid agreement, afterwards and before the exhibiting of the bill of the ſaid plaintiff's, on, &c. the ſame being within a reaſonable time next after the making of the ſaid agreement, tendered and offered to pay, and cauſed to be tendered and offered to be paid to the ſaid plaintiffs the ſum of 5*l.* 5*s.* being ſo much as amounted to 5*s.* 6*d.* in the pound upon the ſaid ſum of 18*l.* 14*s.*, the ſaid amount of the ſaid debts, ſo as aforeſaid due and owing from the ſaid defendant to the ſaid plaintiffs, and which ſum of money, ſo tendered and offered to be paid as laſt aforeſaid, the ſaid plaintiffs then and there refuſed to accept of and from the ſaid defendant: and the defendant, from the time of the making ſuch tender, always hath been, and ſtill is, ready to pay, &c., and brings the ſame into court, &c.

To this plea there was a general demurrer and joinder. The Court held, that the plea was bad on this ground, namely, that a mere promiſe by a creditor to take leſs than his whole demand, is not obligatory on him, but is *nudum pactum* for want of a conſideration.

Buller, J. ſaid, "The queſtion in this caſe is, whether there is any conſideration for the promiſe as ſtated in the plea. It has been ſaid, by the defendant's counſel, that in effect, by this agreement, the debt was aſcertained; a fund was provided for the payment of it; and all the creditors were bound to forbear. If the fact had been ſo, that might have been a good plea; but the reverſe appears by the defendant's plea: for, firſt, the debt is not aſcertained by the agreement; it is only averred, that it amounts to ſo much, nor is at any time ſpecified for the payment of it. Secondly, no fund is appropriated for the payment of the debt. If the debtor had aſſigned over all his effects to a truſtee, in order to make an equal diſtribution among all his creditors, that would have been a good conſideration in law for the promiſe; but no ſuch fact appears in this caſe. Thirdly, it was ſaid, that all the creditors were bound by this

this agreement, to forbear; but that is not ſtated by the plea. It is only alleged that they agreed to take a certain proportion; but that is *nudum pactum*, unleſs they had afterwards accepted it.

If all the creditors of an inſolvent conſent to accept a compoſition for their reſpective demands upon an aſſignment of his effects by a deed of truſt, to which they are all parties; and one of them, before he executes it, obtains from the inſolvent a promiſſory note for the reſidue of his demand, by refuſing to execute till ſuch note be made, it is void in law, as a fraud on the reſt of the creditors; and a ſubſequent promiſe to pay it is a promiſe without conſideration, which will not maintain an action.

Thus, in the caſe of *Cockſhott* and another v. *Bennett* and another, (*f*) which was an action of *aſſumpſit* on a promiſſory note. The circumſtances of the caſe were theſe: the defendants being conſiderably indebted to the plaintiffs, and to ſeveral other creditors, and being inſolvent, aſſigned over all their effects in truſt, to pay 11*s.* in the pound to their creditors, to which they all conſented, and ſigned the deed, except the plaintiffs, who, as their demand accrued juſt before the failure, refuſed to ſign the deed, and to take any compoſition, unleſs the defendants would give them a note for the remaining 9*s.* in the pound. They accordingly gave them the note in queſtion to that amount, on which the plaintiffs ſigned the deed, and the defendants made a ſubſequent promiſe to pay it. It alſo appeared that the reſt of the creditors would not have ſigned the deed, unleſs the plaintiffs did ſo likewiſe.

The Court determined that the plaintiffs could not recover on the note, it being obtained from the defendants in fraud of the other creditors.

Lord *Kenyon*, Ch. J. ſaid, "In determining this caſe, I wiſh to diſclaim founding my opinion upon grounds of equity, as contradiſtinguiſhed from grounds of law. The foundation of my opinion is, that the temptation to give this note was a fraud on the creditors who were parties to the contract, on which their debts were to be cancelled in conſideration of receiving a compoſition. The note preceded the execution of the deed: all the creditors

(*f*) 2 *Term Rep.* 763. *See alſo* Smith v. Bromley, *Doug.* 696. *in notis.* Jackſon v. Lomas, 4 *Term Rep.* 166. *S. P.*

being aſſembled for the purpoſe of arranging the defendant's affairs, they all undertook and mutually contracted with each other, that the defendant ſhould be diſcharged from their debts, after the execution of the deed. Then theſe plaintiffs, in fraud of that engagement, entered into a contract with the defendants, which prevented their being put in that ſituation which was the inducement to the other creditors to ſign the deed, and to relinquiſh a part of their demands. If a bankrupt, or an inſolvent, after becoming free from his engagements, having no reſtraint on his mind, voluntarily give ſecurity for a former demand, which is only due in conſcience, ſuch a ſecurity may be enforced in a court of law. But the contract, in the preſent caſe, affected all the other creditors, by rendering abortive all that they had intended to do for the bankrupt, in compounding for their debts. It has been ſaid, that the Court of *Chancery* has interfered in theſe caſes on equitable principles; and that ſome of the caſes are one way, and ſome another. But I do not know that Lord *Hardwicke,* (in Lord *Cheſterfield* v. *Janſen*) (*g*) would have been of a different opinion in a court of law. And during the time that I was in a court of equity, the deciſions on this ſubject were uniform; and in theſe ſort of caſes the court ordered the ſecurities to be delivered up. Then, as to the revival of this debt by a ſubſequent promiſe, contracts not founded on immoral conſiderations may be revived, though before there was no legal remedy. But this tranſaction is bottomed in fraud, which is a ſpecies of immorality; and not being available, as ſuch, cannot be revived by a ſubſequent promiſe.

So, in the caſe of *Stock* v. *Mawſon,* (*b*) where the creditors of a bankrupt entered into a deed of compoſition to receive 8*s.* in the pound, in full diſcharge of their debts, and agreed to releaſe every thing beyond that to the bankrupt, and join in a petition to the *Chancellor* to ſuperſede the commiſſion. One of the creditors having two diſtinct debts due from the bankrupt, for one of which he held bills to the full amount, received his dividend of 8*s.* in the pound on both debts, and then recovered the full value of ſome of the bills. The Court determined, that the bankrupt was entitled to ſue for the money ſo obtained on the bills, in an action for money had and received.

(*g*) 2 *Ver.* 125. 1 *Atk.* 301. 1 *Wils.* 286. (*b*) 1 *Bos. and Pul.* 286.

But

But in the caſe of *Feiſe* v. *Randall*, (*i*) where a deed of compoſition was made between a trader and his creditors, by which it was agreed that the trader ſhould give them his bills, accepted by a friend, for 10*s.* in the pound, payable in certain proportions at fixed periods, and his own promiſſory notes for the remaining 5*s.*, and that the creditors ſhould be at liberty to take his ſecurity alone for the full amount of their reſpective debts. One of the creditors, who ſigned the deed, took bills from the debtor, accepted by his friend, for the whole 15*s.* in the pound, payable at the ſame reſpective times as the bills agreed to be given by the deed of compoſition. The payment of theſe bills was reſiſted upon the ground that it was a ſecurity beyond that agreed for, and greater than the other creditors obtained. But the Court decided, "That this did not fall within the principle of that claſs of caſes, wherein ſecurities of this nature had been held void, as being againſt good faith, and in fraud of the other creditors; for that here the plaintiff had received no more than the reſt of the creditors; and it was no fraud upon them that another perſon had agreed to join his ſecurity to the debtor's for the payment of the ſame ſum that all the other creditors were to receive."

However, in the caſe of *Leiceſter* and another v. *Roſe*, (*k*) which was an action of *aſſumpſit*, in which the plaintiffs declared, that before the making of the agreement after mentioned, a certain deed of truſt, dated 6th of *Auguſt*, 1801, had been prepared between *W. Thompſon* and *E. Leadbetter*, of the firſt part, *B. Shawe* and *W. Borrowes*, of the ſecond part, and certain creditors of *Thompſon* and *Leadbetter*, of the third part; wherby, after reciting, that *Thompſon* and *Leadbetter* being unable to make preſent payment of the whole of their debts, had propoſed to their creditors to pay them by inſtalments, *viz.*, one-eighth in one month, another eighth in three months, another in ſix months, another in twelve months, two-eighths in eighteen months, and the remaining two-eighths in twenty-four months; and that to ſecure the ſecond, third and fourth inſtalments *Thompſon* and *Leadbetter* were to give their promiſſory notes indorſed, half of them by *Shawe* and Co., and the other half indorſed by *Borrowes* and Co., (thoſe houſes having

(*i*) 6 *Term Rep.* 146. (*k*) 4 *Eaſt Rep.* 372.

agreed

agreed to become sureties for *T.* and *L.* to that amount respectively, upon having certain counter securities after mentioned, given to them; and that to secure the two last instalments *Thompson* and *Leadbetter* were to give their own promissory notes. And they were also to assign to *Shawe* and *Borrowes* their estate and effects, as well to indemnify the respective houses of *Shawe* and Co., and *Borrowes* and Co. what they might be called upon to advance, as also for securing to the creditors at large, the payments of the two last instalments; it was witnessed that *Thompson* and *Leadbetter* did, by consent of their creditors, assign to *Shawe* and *Borrowes* their estate and effects in trust for the above-mentioned purposes; the surplus, if any, to be paid to *Thompson* and *Leadbetter*. The declaration then stated that before, and at the time of making the agreement and promises next mentioned, *Thompson* and *Leadbetter* were indebted to the plaintiffs in 1765*l.*, and thereupon on the 3d of *September*, 1801, by a certain agreement between the plaintiffs and the defendant, reciting that the first mentioned trust-deed had been proposed to the creditors of *T.* and *L.*, and in part carried into execution by the signatures of many of the creditors; and the plaintiffs having been applied to to sign the same as creditors of *T.* and *L.* had declined executing it, conceiving that they had a remedy for their demand against other persons jointly with *T.* and *L.*; and in order to induce the plaintiffs to sign the said deed, the defendant agreed that he would within six weeks procure security to the satisfaction of the plaintiffs, to be given to them for payment of the two instalments, &c., amounting to 10*s.* in the pound, agreed to be paid in the trust by the notes of *T.* and *L.* only, the former instalments amounting to 10*s.* in the pound, being to be paid in a manner satisfactory to the plaintiffs; in consideration of which agreement of the defendant, the plaintiff agreed to sign the said trust-deed in respect of their said debt. It then stated, that after the said agreement, in consideration that the plaintiffs, at the instance of the defendant, had promised to fulfil the agreement on their part, the defendant promised to the plaintiffs to perform his part of it; and then it averred that *Thompson* and *Leadbetter* being indebted to the plaintiffs, at the time of the agreement, in 1765*l.*, the two last instalments, for which the defendant agreed to procure security, amounted to 441*l.* 5*s.*, of which the defendant had notice; but though the plaintiffs had performed their part of the agreement, yet the defendant, on his

part,

part, had not procured any ſecurity to the plaintiff for the payment of the ſaid two laſt inſtalments, &c., by means whereof the firſt of the inſtalments ſtill remained due and unpaid, &c. To this the general iſſue was pleaded.

At the trial, before Lord *Ellenborough*, Ch. J., the ſubſtance of the facts ſet forth in the declaration were proved; and it was alſo proved, that upon the firſt application of *Thompſon* and *Leadbetter* to their creditors to ſign the truſt-deed of the 6th of *Auguſt*, 1801, ſeveral of them, particularly three mercantile houſes in *Liverpool*, refuſed to ſign it, unleſs the plaintiffs, who were ſome of the creditors, firſt ſigned it. This was made known to the plaintiffs by *Thompſon*, who anſwered, that it was in vain to apply to them to ſign it, unleſs they, (*T.* and *L.*,) got collateral ſecurity for them, (the plaintiffs,) for the two laſt inſtalments as well as thoſe which were to be ſecured by the deed; whereupon *Thompſon* and *Leadbetter* promiſed to procure ſuch ſecurity and prevailed upon the defendant to make the promiſe ſtated in the declaration. And then the plaintiffs having ſigned the deed, the three other houſes, on ſeeing the plaintiffs' ſignatures to it, ſigned it alſo; but without any knowledge, as far as appeared, of the promiſe of collateral ſecurity which the plaintiffs had obtained. On the 9th of *February*, 1803, the day when the firſt of the two laſt inſtalments, payable by *Thompſon* and *Leadbetter*, became due, application was made by the plaintiffs to them for payment of their note which was refuſed; and on the 26th of *May* the defendant was formally called upon by the plaintiffs' attorney for the promiſed ſecurity, which he declined to give. His lordſhip being of opinion that the collateral ſecurity, thus obtained by the plaintiffs, unknown to the other creditors, was a fraud upon them, within the principle of the caſe of *Cockſhott* v. *Bennett*, and that claſs of caſes; and that the promiſe by the defendant was therefore made upon a bad conſideration and void, nonſuited the plaintiffs.

A motion, however, was afterwards made for ſetting aſide the nonſuit, and granting a new trial, principally on the ground that the additional ſecurity, obtained by the plaintiffs in this caſe, did not alter the condition of the inſolvents, on which ground it was ſaid, that the former caſes had proceeded: and the caſe of *Fieſe* v. *Randall*, was particularly relied on as ſuſtaining this diſtinction, and governing the preſent caſe.

But the Court refuſed the rule, and determined, that the agreement in queſtion was a fraud upon the other creditors, and therefore

fore void, although the effect of it was not to ſecure to the plaintiffs the payment of more money than the creditors were to receive, but only a further ſecurity for the ſame ſum.

Lord *Ellenborough*, Ch. J. ſaid: "From the firſt mention of this caſe to the preſent moment I have never entertained a particle of doubt upon it, the queſtion is, whether any legal effect can be given to an agreement by which theſe creditors, the plaintiffs, are to have a better ſecurity for the ſame ſum than the reſt of the creditors, after having entered into an agreement with them, importing that the ſame ſatisfaction was to be made to all by the ſame mode of payment. And as that ſatisfaction was not to be paid at the time in money but in ſecurities, payable at a future day, it made a great difference to the creditors whether they were to reſt on the inſolvent's ſecurity alone, perhaps a deſperate ſecurity, or to have other ſolvent perſons to reſort to, if neceſſary: ſo that it might make the difference of payment, or no payment: and in that light it ſeems to have been conſidered by the plaintiffs themſelves. In *Feiſe* v. *Randall*, the Court are ſtated to have ſaid, that the agreement there made with the particular creditor, was no fraud upon the reſt. I muſt therefore preſume that the caſe was ſo preſented to the conſideration of the court, and that they decided it on that ſuppoſition on the firſt view of it. But is there no fraud on the reſt of the creditors in this caſe? Was there no fraud even in the minds of the plaintiffs at the time? They were told that other creditors would not ſign the truſt-deed, unleſs they did ſo; and yet they bargained for better ſecurity as the ground of their ſigning it; and when they did ſign the deed, purporting to accept the ſame ſecurity as the reſt, they had, in fact, got a better ſecurity: while the other creditors, induced by the plaintiffs' example, ſigned it in ſimplicity and in confidence that no better terms where to be had by any of them. Therefore though this be not like ſome of the caſes mentioned, where ſecurity was obtained by the particular creditors for more than the others were to receive, yet the principle of all of them is the ſame, that where the creditors in general have bargained for an equality of benefit and mutuality of ſecurity, it ſhall not be competent for one of them to ſecure any partial benefit or ſecurity to himſelf. This is the effect of all that has been ſaid in thoſe caſes; and every one who recollects the ſtrong impreſſions made upon the mind of the noble and learned judge, who preſided here during the period of thoſe determinations, may ſuſpect that if this caſe,

caſe, which ranges itſelf ſo preciſely within the principle of thoſe, had been preſented to him for his opinion, he would at once have decided againſt the plaintiffs' claim. In *Feiſe* v. *Randall*, there was no rule to ſhow cauſe granted, the caſe therefore was not ſufficiently expanded to the conſideration of the whole Court, ſo as to eſtabliſh a precedent, which ſhould break in upon the authority of the former deciſions, which were more maturely weighed: and all that I conſider that caſe as having determined is, that there was no fraud there againſt the other creditors: and here I conſider that there was fraud. I will not go upon the idea of this being a fraud or oppreſſion upon the compaſſion of friends to perſons in diſtreſs, which was thrown out in one of the caſes alluded to; for in all caſes of obtaining collateral ſecurity, ſomething of that ſort is to be found. Coupled with the facts in that caſe, perhaps the expreſſion may have been warranted: but in truth all collateral ſecurity may, in ſome ſenſe, be ſaid to be extorted from the benevolence of friends, without any impeachment of its validity. But the ground I go upon is, that this agreement was a fraud againſt the reſt of the creditors."

5. *Of Agreements to pay Money in Conſideration of a Creditor's either diſcharging his Debt, or his Debtor, and delivering up Securities, &c.*

An action of *aſſumpſit* will lie upon a promiſe to pay money in conſideration of diſcharging a debt, or giving up ſecurities.

Thus, (*l*) if *A.* be indebted to *B.* in 200*l.*, and *A.* appoints *B.* to receive it from *C.*, and for the better ſatisfaction of *B.*, *A.* delivers certain bills of exchange to one *D.*, the factor of *B.*, for payment thereof; and upon this *C.* promiſes *B.* that in conſideration that he would deliver to him the ſaid bills of exchange, ſo delivered to *D.*, the factor of *B.*, that he would pay the ſaid 200*l.* due by *A.* to *B.*, this is a good promiſe, for the conſideration is valuable; for though *C.* can do nothing with the bills, being a ſtranger to them, yet it may be ſome advantage to him to have the poſſeſſion of them, at leaſt it may be ſome prejudice to *B.*, and therefore the conſideration is good.

(*l*) 1 *Dan.* 50 *pl.* 21.

So,

So, (*m*) if *L.* be indebted to *M.*, and *L.* delivers to *M.* certain goods to the value of 100*l.* as a pawn till he pays him the debt, and after *J. S.* comes to *M* and promises to pay him the debt, in consideration that he will deliver to him the said pawn, upon which he delivers it to him accordingly; this is a good consideration to have an action upon the case against *J. S.*

So, in the case of *Meredith* v. *Chute*, (*n*) which was an action of *assumpsit*, wherein the plaintiff declared that the defendant, in consideration that the plaintiff, at the special request of the defendant, *deliberasset* to the defendant *quandam notam*, by which one *Hurst* assumed to pay to the plaintiff a hundred guineas, assumed to pay to the plaintiff, &c. Upon *non assumpsit* pleaded, and a verdict for the plaintiff; it was moved in arrest of judgment, that the consideration of this promise was not good, since it did not appear that *Hurst* gave this note to the plaintiff upon any good consideration, and, consequently the said note would be void, and then the delivery of the said note by the plaintiff to the defendant would be no prejudice to the plaintiff, nor advantage to the defendant. But it was resolved, (*per totam curiam,*) that this was a good consideration; for though no consideration was expressed in *Hurst*'s note, yet the note being subscribed by *Hurst*, was good evidence of debt due from *Hurst* to the plaintiff; and therefore the delivery of the evidence of his debt to the defendant at his request, was a good consideration of the *assumpsit* of the defendant, upon which this action was brought. And judgment was given for the plaintiff. Note, *Holt*, Ch. J. said: "That he was of opinion upon the trial, that it was not necessary for the plaintiff to prove upon what consideration the note of *Hurst* was given, the defendant having admitted it to have been given upon good consideration by his promise.

So, where a broker having a lien on certain polices of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiffs giving up to him such polices, in order that he might collect for the principal the money due thereon from the underwriters; which was accordingly done, and the money was afterwards received by

(*m*) 1 *Dan.* 47. *pl.* 8. (*n*) 2 *Ld. Raym.* 759 *Salk.* 25. 7 *Mod.* 12. *S.C.*

the

the defendant: it was held that this was not a promiſe for the debt or default of another within the ſtatute of frauds; and that the plaintiff might recover againſt the defendant as well for the breach of agreement in not providing for the payment of the acceptances, as alſo upon a count for money had and received. (*o*)

With reſpect to agreements made by a creditor with a ſtranger, to accept the latter as his debtor in lieu of, and to diſcharge the original debtor, courts of law have holden ſuch agreements to be void. (*p*). But in the caſe of *Roe* v. *Haugh*, (*q*) *A.* was indebted to *B.* in 20*l.* and *C.* in conſideration that *B.* would accept him to be his debtor inſtead of *A.*, he promiſed to pay *B.* the debt. *B.* died, and his executor brought an action of *aſſumpſit* againſt *C.*, averring in the declaration that *B.* accepted him to be his debtor without ſaying that *A.* was diſcharged: on *non aſſumpſit* pleaded, the plaintiff obtained a verdict and judgment. And on a writ of error in the *Exchequer Chamber*, that court affirmed the judgment, and held, "That this being after verdict they ought to do what they could to help the judgment, and therefore they would not take it as a promiſe only on the part of *C.*, becauſe as ſuch it could not bind, except *A.* was diſcharged; but they conſtrued it as a mutual promiſe, *viz.*, that *C.* promiſed *B.* to pay the debt, and *B.* promiſed in conſideration thereof to diſcharge *A.* By which means, if *B.* ſues *A.*, he ſubjects himſelf to an action for the breach of his promiſe." This judgment, however, appears to have been affirmed by the opinion of *four* judges only againſt *three*, *viz.*, *Treby*, *Lechmere*, *Nevil* and *Powys* to affirm; and *Ward*, *Powell* and *Blencoe* to reverſe.

6. *Of Agreements to pay a Precedent Debt in Conſideration of the Creditor's proving it upon Oath; or of the Debtor's failing to prove it paid, &c.*

It ſometimes happens, when a debt is diſputed, that the debtor, or a third perſon for him, agrees to pay it in conſideration of the

(*o*) Caſtling v. Aubert, 2 *Eaſt Rep.* 325. (*p*) 1 *Saund.* 210. *Sty.* 249. *Hard.* 73.
(*q*) 1 *Salk.* 29. *See alſo* 1 *Ventr.* 9.

claimant's proving it to be due by the oath either of himself or witnesses before a magistrate, &c.

Thus, in the case of *Amie* v. *Andrews*, (r) which was an action of *assumpsit*, wherein the plaintiff declared, that whereas the father of the defendant was indebted to him in 20*l.* for malt sold, and promised to pay it; that the defendant in consideration that the plaintiff would bring two witnesses before a justice of peace, who upon their oaths should depose, that the defendant's father was indebted to the plaintiff, and promised payment, assumed and promised to pay the money: then avers, that he did bring two witnesses, &c., who did swear, &c., the defendant pleaded *non assumpsit*; which being found against him, he moved in arrest of judgment, that the consideration was not lawful; because a justice of peace not having power to administer an oath in this case, it is an extrajudicial oath, and consequently unlawful. And *Vaughan* was of opinion, that every oath not legally administered and taken is within the statute against prophane swearing; and he said it would be of dangerous consequence to countenance these extrajudicial oaths, for that it would tend to the overthrowing of legal proofs. *Wyndham* and *Atkins*, thought it was not a prophane oath, nor within the statute of King *James*, because it tended to the determining of a controversy. And accordingly the plaintiff had judgment.

Lord Chief Baron *Gilbert* in his Treatise on the Law of Evidence, (s) in citing this case, says: "That the oath, though *extrajudicial*, and though the justices had no authority in the matter, was held good consideration, for the oath tending to a decision of the right, was not held to be contrary to the law of *God*, and therefore the parties might assume upon that consideration, but it is not such an oath as the law takes notice of to punish as perjury.

So, in the case of *Brett* v. *Pretyman*, (t) which was an action of *assumpsit*, wherein the plaintiff declared, that the defendant owed him 15*l.*, and the defendant promised the plaintiff that if he would procure *W.* to take his oath in writing that such a sum was due he would pay it; and the plaintiff avers that he did

(r) 1 *Mod.* 166. *Cro. Eliz.* 469, 470. 1 *Dan.* 45. *pl.* 24. *S. P. Note, such a promise must now be in writing; it being a promise to pay the debt of a third person. Vide Statute of Fauds and Perjuries. Ante Vol.* 1. *Ch.* 4. *s.* 2.

(s) *4th Ed. p.* 67. (t) 1 *Sid.* 289. 2 *Keb.* 26, 44. *Rast.* 153. *S. C.* Perkins v. Binke, 2 *Sid.* 123. *S. P.*

procure

procure the ſaid *W.* to take the oath in writing before *J. S.*, maſter of *Chancery*, yet the defendant refuſed to pay, &c. The defendant demurred to this declaration; and after ſeveral arguments it was adjudged that this was a good conſideration, and that the plaintiff ſhould have judgment: for though the maſter of *Chancery* had no power as judge to adminiſter the oath, yet this was an oath in conſcience, and within the meaning of the parties, and made ſolely for the deciding of a right.

So, in an action upon the caſe (*u*) by *A.* againſt *B.*, if the plaintiff declares that they accounted together concerning, &c., and upon this account *B.* was found 10*l.* in arrear to the plaintiff; and upon this *B.* affirmed that he had paid it to *J. S.* to the uſe of the plaintiff, and thereupon *B.* promiſed that if he could not prove in a *ſhort time*, that he had paid it to *J. S.* to the uſe of the plaintiff, he would pay it to the plaintiff, and avers that he had not proved it from the time of the promiſe to the time of the action brought, which was a year; this is a good conſideration, and the words "*ſhort time*" is to be intended a reaſonable time to make his proof.

(*u*) 1 *Dan.* 52. *pl.* 30. 1 *Vin. Abr.* 309. *pl.* 30.

CHAPTER XV.

Of Agreements for the Relinquiſhment or Sale of Offices, &c.

NO action will lie upon a contract reſpecting the appointment to, or ſale, &c. of a public office.

Thus, in the caſe of *Garforth* v. *Fearon*, (*a*) which was an action of *aſſumpſit* for money had and received, brought by the direction of the *Maſter of the Rolls*, in conſequence of a bill filed in equity, by the plaintiff and his ſon, praying that the defendant might be declared a truſtee of the office of cuſtomer of *Carliſle*, for the plaintiff, for the benefit of the ſon. On the trial of the cauſe at the ſittings in *Trinity Term*, 1787, before Lord *Loughborough*, Ch. J. it appeared in evidence, that application was made to the Lords of the *Treaſury* by the friends of the plaintiff, to procure for the defendant the office of cuſtomer of the port of *Carliſle*. On the 25th of *February* 1773, the defendant ſigned the following declaration, "I do hereby declare, that my own name was made uſe "of, in truſt for Mr. *John Garforth*, on the application made to "the Lords of the treaſury, for the office or place, lately held by "Mr. *Grape*, deceaſed, in the county of *Cumberland*; and I do "hereby promiſe, in caſe any appointment, has been or is made "thereof, that I will upon requeſt, appoint ſuch deputy, or depu-"ties as he ſhall nominate, and alſo empower the ſaid Mr. *Gar-"forth* to receive the ſalary, ſtipend, wages, and fees of the ſaid "office to his own uſe.

"Witneſs my hand, *Benſon Fearon*."

On the 27th of *February* 1773, the defendant was appointed by patent to the office, and afterwards on the nomination of the plaintiff, conſtituted deputies for *Carliſle*, *Whitehaven*, and *Workington*;

(*a*) 1 *H. Bl.* 327. *Vide* Godolphin v. Tudor. 1 *Bro. P. C.* 135. *S. P.*

but

but having received the profits, did not account for them to the plaintiff, in conſequence of which the bill was filed. A verdict was found for the plaintiff, with leave to move the court to enter a nonſuit.

A motion to this effect was accordingly made, and, after argument at the bar, Lord *Loughborough* delivered the opinion of the court as follows:

"On full conſideration of all the arguments uſed in this cauſe, I am of opinion that the tranſaction which is the foundation of the action is illegal, and the agreement void. This tranſaction concerns a public office, deemed by law to be a place of public truſt, *prohibited to be ſold*; and even the deputation of which, where ſuch deputation may be made, cannot be an object of ſale. The tranſaction is, that *Fearon* being appointed by the recommendation of *Garforth*, ſhall not interfere in the office, but ſhall appoint ſuch deputies as *Garforth* ſhall nominate, and pay to him the profits. The effect of this is, that to all profitable purpoſes, and as to all the exerciſe of the office except as to ſigning a receipt for the ſalary, *Garforth* is the real officer, but is not accountable for the due execution of it; he may enjoy it without being ſubject to the reſtraints impoſed by law on ſuch officers, for he does not appear as ſuch officer; he may vote at elections, he may exerciſe inconſiſtent trades, he may act as a magiſtrate, in affairs concerning the revenue, he may ſit in parliament, and will be ſafe if he remains undiſcovered. If extortion be committed in the office by thoſe appointed, the profits of that extortion redound to him, but he eſcapes a proſecution; for not being the active officer, he does not appear regiſtered upon the records of the *Exchequer*, and is not liable to the diſabilities impoſed by the ſtatute on officers guilty of extortion, who are incapacitated to hold any office relating to the revenue. Whether a truſt can be created in ſuch an office, is for the conſideration of the court in which the ſuit was originally brought: the only queſtion in this court is, whether the agreement ſpringing out of ſuch a tranſaction can ſupport an action?

The written agreement of the 25th of *February* 1773, was for two purpoſes; one, to appoint ſuch deputies as the plaintiff ſhould name; the other to pay over to him all the profits of the office. Though this caſe has been argued very fully and very ingeniouſly by the counſel on both ſides, I do not recollect any ar-

gument uſed in ſupport of the firſt promiſe, namely to appoint at the nomination of another, deputies, for whom the perſon appointing is in point of law anſwerable, and whoſe places he is not allowed to ſell or bargain for. The argument and doctrine laid down in the caſe of *Smith v. Caleſhill*, 2. *And.* 55, which is ſimilar to this, are that if one part of the agreement were bad, no action could be maintained on any other part which might be good. But it is not neceſſary to reſt on this point, becauſe I am of opinion that the agreement is bad in both parts. If it be without any conſideration in a court of law, no action will lie upon it; it is but *nudum pactum*. What then is the conſideration upon which this agreement proceeds? It is that *Fearon* is appointed on the application of *Garforth* in truſt for him; this is the conſideration. Now what is this but in plain terms this propoſition; viz. that the public is abuſed, and the king deceived in the application? I ſhould therefore not find much difficulty to conclude, if there were nothing more in the caſe, that the common law would not ſupport an *aſſumpſit* on ſuch an agreement. But I think it is clearly void by poſitive law reſpecting this office. The appointment of any cuſtomer by any means contrary to the ſtatute 12 *Ric.* 2. *cap.* 2. is a miſdemeſnor. That ſtatute, though very antient is certainly not obſolete; it is the ſtatute under which they are ſworn in the *Exchequer*. It not only prohibits the appointment but goes on to ſay that "none that purſueth by him or by "others, privily or openly, to be in any manner of office ſhall be "put in the ſame office, or in any other," and the 5 & 6 *Edw.* 6. *cap.* 16. makes void all promiſes, bonds, and aſſurances as well on the part of the bargainor, as the bargainee. It is ſaid, that this was *no ſale of the office*, that no money has paſſed on the part of *Fearon* to obtain it. But the ſtatute does not ſtop there. It is is neither confined in its expreſſions nor its intent. In the caſe where a perſon obtaining an office gives money, the words of the act are extremely general, and according to their obvious conſtruction without any enlargement neceſſarily require that all bargains for money concerning thoſe offices which are mentioned in the ſtatute, are and ſhall be prohibited. Now is it not clear, that the plaintiff has bargained with the defendant? Would the defendant have had the office without that bargain? The promiſe which is the ground of this action is, that the plaintiff ſhall have all the profits. By the words of the ſtatute any profit however ſmall, would have affected the tranſaction; but here there is a

bargain

bargain for the whole. Courts of law have very properly conſidered this as a remedial ſtatute, and have conſtrued it liberally where the validity of ſuch a tranſaction has been brought before them.

The caſe of *Sir Arthur Ingram* (*b*) has been cited, and there it is clear that the tranſaction was not immoral; it was no otherwiſe wrong than as it was prohibited, by a poſitive ſtatute. It was a bargain between *Sir Edward Vernon*, and *Sir Arthur Ingram* for a ſurrender of the office of cofferer of the houſehold; on the ſurrender of *Vernon*, *Ingram* was appointed, and a bond given to account for the profits. This was holden to be within the ſtatute, becauſe he had charge of the King's money, to pay the houſehold. In that caſe, the king was not deceived. The tranſaction was public and notorious, and the crown was diſpoſed to have re-appointed the officer with a *non obſtante*; but the queſtion being referred to the *Chancellor* and twelve Judges, whether the king could by a *non obſtante* give the right of receiving the appointment to *Ingram*, their opinion was, that the caſe was within the ſtatute, and therefore that *Ingram* was diſabled from taking the office, and could not by a *non obſtante* be made capable of holding it. In the caſe of *Godolphin* v. *Tudor*, 6 *Mod.* 234. which is alſo in 2 *Salk.* 251. which was mentioned in the argument, the tranſaction was between the principal and the deputy, and the agreement was, that the deputy executing the office ſhould pay to the principal, out of the profits a certain ſum. The court there held, where the agreement was to pay out of the profits a certain proportion of the profits, it was not within the ſtatute; and the reaſon given is very plain, and carries its own authority with it, namely, that the principal is entitled to all the perquiſites and fees of the office, and the deputy to a recompence, as it were on a *quantum meruit* for the labour he has in the execution of it. All the effect therefore, of ſuch an agreement is, to aſcertain the ſhare which the deputy ſhould have for the execution of the office. But it is remarkable with what ſtrictneſs the courts have holden that propoſition, and how careful they have been to guard againſt any tranſaction that mightgive any colour to the principal's receiving a groſs ſum out of the profits of an office executed by a deputy. For in this caſe, as it is reported in 6 *Mod.*, the agreement was that *Tudor* ſhould pay *Godolphin*, 200*l.* a year, and it appeared upon re-

(*b*) *Co. Lit.* 234. *a.*

cord that the profits of the office amouted 329*l.* 10*s.* every year in which it had been executed by *Tudor*, but as the ſtipulation was to pay 200*l.* a year, abſolutely without any reference to the profits of the office, the court thought themſelves bound to give judgment for the defendant. Now that was a tranſaction perfectly fair, the miſtake in ſtating the manner of the agreement was an innocent one, but the court would not permit the plaintiff to recover on an agreement, where it was not ſtated on the agreement itſelf that the payment ſhould be only of a portion of the profits, not an abſolute one of the whole.

Courts of *Equity* in ſetting aſide ſecurities ſuppoſed to be valid at law, have gone by the ſame rule, and have been juſt as careful not to permit by any conſtruction, any breaches to be made in the proviſions of the ſtatute. The caſe of *Locknor* v. *Strode*, 2 *Chan. Caſ.* 48. was quoted as a determination, where the court of *Chancery* held a looſer rule, with reſpect to giving a bond for the payment of a certain ſum to the principal appointing a deputy. But that caſe is, as moſt of the others are in the ſame book, groſsly miſreported: no ſuch determination was made, and both the ſtate of the caſe and the deciſion are perfectly miſtaken. I have a copy of it from Lord *Nottingham*'s Notes, from which it appears that the defendant, being ſheriff, made *John Lockner* his under ſheriff, and the plaintiff who was the brother of *John Lockner*, gave a bond as a temporary ſecurity till the common ſecurity was given. *John* gave a bond in the uſual form from an under ſheriff to his principal, for performance of the covenants in the indenture; but the firſt bond was not given up. *Strode* after he was out of office arreſted the plaintiff on it, who was obliged to give bail to *Sir Francis Rolle*, the ſucceeding ſheriff in 600*l.*: and to be relieved was the object of the bill. The defendant pleaded a ſpecial agreement, that the bond was to ſecure him 400*l.* by quarterly payments for the under ſheriff's place. This the plaintiff denied, and alſo inſiſted that ſuch an agreement was illegal and contrary to the ſtatute 23 *Hen.* 6. *cap.* 9. The Chancellor being under doubts, a trial was directed, and the point reſerved. So that no opinion was given by him on the validity of the tranſaction. The date of that caſe is alſo miſtaken; it is ſtated in the report to have been *Feb.* 9. 1680, but it was in fact in *Hilary* Term, 28 *Car.* 2. But in a ſubſequent caſe, Lord *Nottingham* very plainly intimated what would have been his opinion, if the agreement had been found good in law. That was the caſe of *Juxton* v. *Morris*, which

which is in the ſame book, and alſo miſreported. By Lord *Nottingham's* notes it appears that a biſhop's regiſtrar made a deputation of his office, rendering thereout 90*l. per annum*; the plaintiff exhibited a bill for an account, and the defendant pleaded that it was within the ſtatute of 5 & 6 *Ed.* 6 and that there ought to be no account. It was anſwered, that this was only a reſervation of part of the profits, and the principal being entitled to the whole, it was not illegal; which ſays (Lord *Nottingham*,) "ſeemed ſpecious." But upon looking into the bill it charged an expreſs covenant to pay 90*l.* a year, without reference to the profits of the office. The plea was therefore allowed, and the bill diſmiſſed. Theſe caſes connected ſhow that the opinion of the Court of *Chancery* at that time in conſidering how far theſe ſecurities were liable to be avoided as contrary to the proviſions of the ſtatute was, that between principal and deputy there might be a reſervation out of the profits, (though Lord *Nottingham* did not expreſsly ſo determine) but if otherwiſe, the ſecurity was clearly bad. In the caſe of *Law* v. *Law*, (*c*) Lord *Talbot* ſet aſide a bond ſuppoſing it to be good in a court of law, the conſideration of which differed very little from the preſent. On the part of the plaintiff, the caſe of *Bellamy* v. *Burrow*, (*d*) was relied on as an authority to ſhow that a court of equity will permit a truſt to be created of an office, clearly within the ſtatute *Ed.* 6. and on reading that caſe with attention, I admit it is a determination full to the point for which my brother *Adair* cited it; and undoubtedly as ſuch a determination it is of very conſiderable authority, both in reſpect to the learning and the known integrity of Lord *Talbot*. But it is fit to be obſerved, that in the ſame caſe there ſtands very fully delivered the opinion of Sir *Joſeph Jekyll* to the contrary; and it reſts upon an oppoſition between two very learned and upright men. Either opinion is probable, when there is ſuch authority for its ſupport. I will not enter into the conſideration of that caſe, nor is it neceſſary to give an opinion here, whether a truſt can in any inſtance be created in ſuch an office. I do not take upon myſelf to ſay, without other conſideration than the preſent circumſtances can afford, that there is no poſſible caſe in which a truſt fit to be executed may not be created in offices within the ſtatute of *Ed.* 6. This is not a caſe of the execution of a truſt, the cognizance of which is peculiar to a court of equity. Perhaps if the Maſ-

(*c*) 3 *P. Wms.* 392. (*d*) *Talb.* 97.

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ter of the Rolls had fixed on *Fearon* the character of a truſtee, a court of law might not think itſelf at liberty to queſtion the authority of the determination. But the whole queſtion for a court of law to determine is ſimply, whether there appears a good conſideration on which an *aſſumpſit* can be ſupported? And I am of opinion, for the reaſons I ſtated, both on the principles of the common law, and becauſe the tranſaction is in defiance of the ſtatutes which have been made to guard againſt evils of the ſame nature, that the conſideration of the promiſe in this caſe is bad, that conſequently it will not ſupport an *aſſumpſit*, and therefore that a verdict muſt be entered for the defendant."

So, a promiſe to pay money in conſideration of the relinquiſhment of an office, in order that another might ſucceed to it, is void.

Thus, in the caſe of *Parſons* v. *Thompſon*, (*e*) which was an action of *aſſumpſit* on a ſpecial agreement. Verdict for the plaintiff, ſubject to the opinion of the court on a caſe which ſtated in ſubſtance, that the plaintiff was for thirty years maſter-joiner of the dock-yard of *Chatham*, and the defendant foreman of the joiners. That the defendant having a proſpect of ſucceeding to the office of maſter-joiner, (which does not go in regular ſucceſſion, but is in the appointment of the commiſſioners of the navy,) applied to the plaintiff to procure himſelf to be ſuperannuated, which he did, on the following written agreement being entered into by the defendant.

"Agreed on the 29th day of *March*, 1785, between Mr. *John* "*Parſons*, maſter joiner, of his Majeſty's dock-yard at *Chatham*, "and *John Thompſon*, foreman of the joiners of the aforeſaid "place. In caſe I ſhould ſucceed Mr. *Parſons* to be maſter-joiner "of the ſaid dock-yard, at the commencement of Mr. *Parſon's* "ſuperannuation, then I do agree to allow him his extra pay "from the yard books, excluſive of his ſuperannuation money, "during his natural life, &c.

"*John Thompſon.*"

The ſuperannuation money was an annual allowance from government.

(*e*) 1 *H. Bl.* 322.

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In 1785 the defendant was appointed to the office. The bare pay of the maſter-joiner is half a crown *per* day, all above is extra pay. There are two ſorts of extra pay, the tide extra, (when the men work by the tide beyond the common yard hours,) and the caſual extra, which includes other extraordinary work. It is all denominated extra pay in the yard books without diſtinction. From 1785 to 1787 the defendant paid to the plaintiff the common tide extra, at the rate of 7½*d. per* tide for ſix winter months, and 1*s.* 3*d.* for double tides, in the ſummer months, but not the caſual extra, which the plaintiff did not demand. In the ſummer of 1787, the caſual extra pay was much increaſed by the extraordinary work performed in fitting out ſhips on the proſpect of an approaching war with the *Dutch*; this caſual pay, ſo increaſed, the plaintiff claimed by virtue of the agreement, but the defendant refuſed to account for to him; and in conſequence this action was brought.

The Court were of opinion, that no action could be maintained on the agreement. Lord *Loughborough*, Ch. J. delivered the opinion of the Court thus: "On the trial of this cauſe two points were made, one, whether the agreement was legal, the other, what was the meaning of extra pay. The ſecond queſtion is immaterial, if the firſt be againſt the plaintiff. But it is to be obſerved, that if the conſtruction be as the plaintiff contends, that all which the defendant could receive as maſter-joiner would be 2*s.* 6*d. per* day, the objection to the validity of the agreement is ſtill more apparent; becauſe it would have this effect, that no exertion of the defendant for which extra pay would be due, would be beneficial to himſelf, which might produce public miſchief. But taking the agreement on this point, in a reſtrictive ſenſe, that it means a certain ſtated and fixed allowance, beyond 2*s.* 6*d.* a day, underſtanding it to be a defined known ſhare of perquiſites, we are all of opinion, that it does not afford a juſt cauſe of action. Every action on promiſes muſt reſt on a fair and valuable conſideration, which it is for the plaintiff to make out. What is the conſideration ſtated here? That the plaintiff repreſented himſelf as unfit for future ſervice, and entitled to a penſion for the paſt. This he did, at the requeſt of the defendant, on the promiſe from him of a certain allowance Now the repreſentation was either true or falſe. If true, there was no ground for any bargain with the defendant: the plaintiff did nothing for the defendant; all he did was for his own eaſe and advantage. If

falſe, the public is deceived, the penſion miſapplied, and the ſervice injured. It is not ſtated that the plaintiff procured the appointment for the defendant, (which would clearly have been brocage of office, and bad, but that he had made way for the appointment. But from thence no valuable conſideration can ariſe. Had the tranſaction paſſed with the knowledge of the admiralty, judging of the caſe, and applying at their diſcretion the allowance they are bound to make, poſſibly it might have ſtood fair with the public: I ſay poſſibly only; to be ſure the ground of deceit on the public would be done away. But this caſe reſts on a private unauthenticated agreement between the officers themſelves, which cannot admit of any conſideration ſufficient to maintain an action. If it could be proved that it was to be meaſured by money, ſo as to form a valuable conſideration, it muſt be in reſpect to the time when it was made, when the plaintiff was prevailed upon to retire in favour of the defendant. In this view it certainly would approach very near to brocage; it would differ very little, in effect, from ſelling the intereſt itſelf, though there would be a difference in the conduct of the party, who in one caſe would be paſſive, in the other active. But his paſſive merit, if I may uſe the expreſſion, would not avail him, where his active exertion would be a demerit. The caſe cited from 1 *Vern.* 98. I think may be ſupported. It was the purchaſe of a commiſſion in the army, which the Duke of *Ormond* refuſed to ratify, on the ground, that the plaintiff had bought without the other party having leave to ſell, who had not bought. I ſhould rather ſuſpect, from the uſual inaccuracy of the caſes in *Vernon*, that the plaintiff got the commiſſion by ſucceſſion, and ſet up this defence againſt the payment of the bond. There is ſomething very like it in the reaſoning of the court, who held there was no relief againſt the bond. The queſtion of the conſideration did not occur to them; and they ſeem to have holden that where commiſſions were generally ſaleable, there was nothing unfair in ſuch a tranſaction. The next caſe in 2 *Vern.* 338. if true, is a deciſion undoubtedly contrary to what we now decide, and I think contrary to an evident principle of law. On the ſtate of the report the bonds are directly and plainly given for brocage of an office of truſt and profit, which is not an object of ſale. I have therefore no difficulty to ſay, that I hold that caſe to be extremely ill-determined, if the note of it be at all correct. The caſe of *Ive* v. *Aſh*, *Prec. Chanc.* 199. I think rightly determined; there

there was a purchaſe of a commiſſion allowed to be ſold, the commiſſion was given up, and and the purchaſer wanted to get rid of the bargain, and be free from the agreement. He objected that a commiſſion in the marines could not be ſold; but it turned out upon examination, that the ſale of ſuch commiſſions was permitted, not being looked as within the ſtatute. I therefore hold that caſe therefore to be well-adjudged: for the queſtion whether an office is ſaleable or not, is a matter of public regulation, and not a queſtion for a court. If by public regulation, right or wrong, certain offices are ſaleable, the court cannot ſet aſide the tranſaction for their ſale, the court is not to make the regulation. Whether by the general police of the country an individual office is ſaleable or not, is not a matter of law. But in the preſent caſe there is no ground to ſay, that the defendant's office was ſold under any regulation, or that the tranſaction between the parties was carried on under any authority, or with the conſent of their ſuperiors. This agreement, reſting on private contract and honour, may, perhaps, be fit to be executed by the parties, but can only be enforced by conſiderations which apply to their feelings, and is not the ſubject of an action. The law encourages no man to be unfaithful to his promiſe, but legal obligations are from their nature more circumſcribed than moral duties.

So, a ſale of the command of a ſhip, employed in the *Eaſt India* Company's ſervice, by the owner thereof without the knowledge of the company, is illegal; and the contract of ſale cannot be the foundation of an action.

Thus, in the caſe *D. Blachford* and another, executors of *G. Blachford* v. *Preſton*, (*f*) which was an action of *aſſumpſit*, on an agreement entered into between the teſtator and the defendant, on the 1ſt of *July*, 1786, in which in conſideration that the teſtator had paid to the defendant 5000*l.* for the command of a ſhip called the *Foulis* in the *Eaſt India* Company's ſervice, the defendant promiſed to pay to the teſtator in his life-time, or to his executors, after his deceaſe, the ſum of 5000*l.*, "upon the appointment of another perſon to ſucceed him, (the teſtator,) in the command of the ſaid ſhip, or of any other ſhip that ſhould be thereafter built on the ſame bottom in lieu and ſtead of

(*f*) 8 *Term Rep.* 89.

the

the teſtator." The declaration, after ſtating forth the agreement, ſtated, that the teſtator died on the 8th of *March*, 1792, and that afterwards, on the 8th of *July*, 1795, another ſhip was built on the bottom of the *Foulis*, called the *Cirenceſter*, to which M. *Lindſay* was appointed as the commander, in lieu and ſtead of the teſtator, but that the defendant on ſuch appointment refuſed to pay the ſum of 5000*l.* to the plaintiff's executors. The ſecond count ſtated the agreement thus; "That the defendant promiſed that the teſtator in his life-time, or his executors after his death, ſhould receive 5000*l.* from the perſon appointed to ſucceed him in the command of the *Foulis*, or of any other ſhip that ſhould thereafter be built on the ſame bottom, in lieu of the teſtator." The third count alleged, that the agreement was, "That the defendant ſhould pay ſuch ſum and ſums of money, and ſecurities for money, not exceeding 5000*l.*, as he, (the defendant,) ſhould receive from the perſon appointed to ſucceed the teſtator in the command of the *Foulis*, or any other ſhip," &c. &c.; averring that M. *Lindſay* was appointed, &c., from whom the defendant received 2500*l.* in money, and a bond for the payment of another ſum of 2500*l.*, which he, (the defendant,) had refuſed to pay and deliver to the plaintiffs, &c. At the trial, before Lord *Kenyon*, Ch. J., the caſe appeared to be this. In the year 1783, the teſtator was appointed to the command of the *Foulis*, *Eaſt Indiaman*, on the recommendation of the defendant, the huſband or managing owner, for which he paid the defendant 5000*l.* On his appointment he and the defendant entered into a charter-party with the *Eaſt India* Company, in which it was agreed, "That neither he or the defendant ſhould ſell, or permit or ſuffer any other perſon to ſell to the maſter, or any other officer of the ſhip, his or their place or office, or take any promiſe or reward for or in reſpect of any place or office in or belonging to the ſhip, &c. In 1791 the *Foulis* was loſt at ſea, with the captain on board, in her paſſage from *Madras* to *Bencoolen*. In 1794 the defendant obtained leave from the *Eaſt India* Company to build another ſhip, (the *Cirenceſter*,) in lieu, and on the bottom of the *Foulis*, and appointed Captain *Lindſay* to the command, in conſideration of 2500*l.* paid in money, and of a bond for 2500*l.* more, which, (he the defendant,) afterwards paid to the widow and children of Captain *Blachford*, not to the plaintiffs, his executors. For a long time prior to the teſtator's appointment to the *Foulis* it had become uſual for

for the captains of *East India* ships to purchase their commands, though it was contrary to the bye laws of the company. In *February*, 1796, the court of directors came to a resolution, which was afterwards confirmed by the proprietors, to abolish the practice "long known to have been privately carried on, and at last publicly avowed, of the sale of commands," and to make a pecuniary compensation, to those who had paid for their commands. And in consequence of this the company afterwards allowed Captain *Lindsay* 4833*l.* as a compensation for what he had paid to the defendant. Under the above resolutions the company also made allowances to the executors of some late commanders. There was no written contract between the testator and the defendant, but it seemed admitted that the former had paid the latter 5000*l.*, under a promise that it should be returned when his successor was appointed. A verdict was taken for the plaintiff, damages 4833*l.*, with liberty to the defendant to move to enter a nonsuit, if the Court of *King's Bench* should be of opinion that the plaintiffs were not entitled to recover. A motion to this effect was accordingly made, and the Court determined, that the contract was illegal, and that the plaintiffs could not recover upon it.

Lord *Kenyon*, Ch. J. said: "There is no rule better established respecting the disposition of every office in which the public are concerned than this, *detur digniori*; on principles of public policy no money consideration ought to influence the appointment to such offices. This principle was much considered by the late Lord Chancellor *Thurlow* in a case that came before him on an injunction bill, where a noble lord having in consequence of his own office in the *King's household*, recommended another person to the appointment of another place in the household, and having made that recommendation, in consideration of an annuity to be granted to a third person, not to himself, the contract was considered as illegal, and a perpetual injunction was granted to the party suing on that contract in a court of law. Up to a certain extent the legislature have interfered and prohibited, by stat. 5 and 6 *Ed.* 6. the sale of some offices; but whether or not that act of parliament were necessary for the purpose, I will not now inquire. If the contract, which is the foundation of this action, were legal, and the question were whether the executors or the widow of the late Captain *Blachford* were entitled to the money in dispute, the right of the former must have prevailed. But a

plaintiff

plaintiff who comes into a court of juſtice to enforce a contract, muſt come on legal grounds; and if he have not a legal title, he cannot ſucceed, whatever the private wiſhes of the court may be. In this caſe the plaintiffs have relied on the practice that, as it is ſaid, had ſo long prevailed of ſelling the commands of ſhips: but that practice is in violation of the laws and regulations of the *Eaſt India* Company. And it appeared, in this caſe, that in the year 1783, a charter-party was entered into, to which the plaintiffs' teſtator, the defendant and the *Eaſt India* Company were parties, and by the expreſs ſtipulation of that contract it was agreed that no place or office in the ſhip ſhould be ſold. I may again reſort to that with which I ſet out, that public policy requires that there ſhould be no money conſideration for the appointment to an office in which the public are intereſted; the public will be better ſerved by having perſons beſt qualified to fill offices appointed to them; but if money may be given to thoſe who appoint, it may be a temptation to them to appoint improper perſons. The *Eaſt India* Company is a limb of the government of the country; and on the ground that this contract was a fraud on the *Eaſt India* Company, from which much miſchief to the public may enſue, I am of opinion that it cannot be made the baſis of an action."

So, if *A.*, being a clerk, promiſes *B.* in conſideration that *B.* will procure him to be rector of a donative church, with cure of ſouls, to pay 10*l.* to *B.*, this is no good conſideration to maintain an action, for this is ſimony, and an offence againſt the laws of *God* and man. (*g*)

So, a promiſe to pay a *per centage* to procure for another a purchaſer of his place in the cuſtoms is void.

Thus, in the caſe of *Stackpole* v. *Earle*, (*h*) which was an action of *aſſumpſit*, wherein the plaintiff declared, that whereas the defendant before and at the time of making the promiſe aforementioned, and afterwards, was ſurveyor of the baggage of the port of *London*, and was greatly deſirous of ſelling and diſpoſing of his ſaid place, and being ſo deſirous to ſell and diſpoſe of the ſame, on the firſt of *January*, 1758, at *Weſtminſter*, in the county of *Middleſex*, in conſideration that the plaintiff, at the defend-

(*g*) *Rol. Abr.* 18. *pl.* 13. *Cro. Car.* 337. 353. 361. Sir W. Jones's *Rep.* 341. (*h*) 2 *Wils.* 133.

ant's

ant's requeſt, would uſe his endeavour to procure, and would procure a proper perſon to purchaſe the ſaid place of the defendant, he undertook and promiſed to pay the plaintiff 2*l.* for every 100*l.* that ſuch perſon ſhould give for the purchaſe of the ſaid place; and the plaintiff avers that confiding in the ſaid defendant's promiſe and undertaking, afterwards on the ſame day and year at *Weſtminſter* aforeſaid, he, at the defendant's requeſt, uſed his endeavours to procure, and by means thereof on the 1ſt of *March*, 1758, at *Weſtminſter*, procured one *John Gunſton*, being a proper perſon, to purchaſe of the defendant the ſaid place for 1200*l.*, and that the ſaid *Gunſton* did give to the defendant 1200*l.* for the purchaſe of the ſaid place, whereby the defendant became liable to pay to the plaintiff 24*l.* for the purchaſe of the ſaid place. There were alſo general counts for work and labour done, &c.

Upon the debating this caſe at the bar, it was urged by the counſel for the plaintiff, that he was neither a buyer or ſeller of the place or office, and that what he had done, was at the defendant's requeſt, and was neither *malum in ſe*, nor *malum prohibitum*, and therefore he ought to be ſatisfied for his labour and trouble; but the whole Court were of opinion, that it was *malum prohibitum*, and within the ſtatute of 5 and 6 *Ed.* 6. *cap.* 16. *ſec.* 2. And though the plaintiff himſelf was neither buyer or ſeller, yet this appears to be a promiſe to pay him money, to the intent that a perſon ſhould have an office belonging to the cuſtoms, which is within the very words of the ſtatute; but Mr. Juſtice *Clive* ſaid, he thought the ſelling of offices was *malum in ſe* at common law, and that if the ſtatute had never been made, he thought the procuring a perſon to buy the office of the defendant was not a good conſideration in law to raiſe an *aſſumpſit*, (which was not denied by any of the judges,) becauſe it was illegal; as if a gaoler permits a priſoner to go at large upon his promiſing to ſatisfy the debt for which he is impriſoned, he eſcapes by the conſent of the gaoler, and does not pay the debt according to his promiſe, the goaler brings *aſſumpſit*, but ſhall not recover, becauſe the conſideration was illegal; for it is a moſt certain principle, that every conſideration to ground an *aſſumpſit* upon muſt be lawful.

But a promiſe by one of two canditates for the office of under-ſheriff, in conſideration that the other will deſiſt, is good.

Thus, in the caſe of *Parker* v. *Brown*, (*i*) which was an action of *aſſumpſit*, whereas the plaintiff was ſuitor to the ſheriff of *Middleſex*, to obtain the office of under-ſheriff for ſuch a year, and to be made under-ſheriff for the ſame year, and was very likely to obtain the ſaid place; for which the defendant alſo, at the ſame time, was a ſuitor; that the defendant, in conſideration the plaintiff would deſiſt his ſuit, promiſed to the plaintiff if he obtained the ſaid office, and was made under-ſheriff, to pay to the plaintiff 20*l.* for ſuch a gelding, which the plaintiff had delivered to him: and allegeth *in facto*, that he delivered to the defendant the ſaid gelding; and that the defendant was made under-ſheriff, and executed the office for the ſaid year; and that he had not paid, &c.

Upon *non aſſumpſit* pleaded, and verdict found for the plaintiff, judgment was given in the *Common Pleas* for the plaintiff; but a writ of error was brought in the *King's Bench:* and the error inſiſted upon was, that this is no lawful nor valuable conſideration. But all the Court held, "That the conſideration was good and valuable; for by this means the plaintiff deſiſted from his ſuit, and the defendant obtained the ſaid office." Wherefore the judgment was affirmed.

(*i*) *Cro. Jac.* 612.

CHAPTER

CHAPTER XVI.

Of Agreements in Reſtraint of Trade.

IF a man for a valuable conſideration agree that he will not exercise his trade or profeſſion within a particular place, he ſhall be bound by it: but a promiſe or obligation which binds any to a total reſtraint of trade, whether for a limited time or generally, is unlawful and void. *

Thus, in the caſe of *Mitchell* v. *Reynolds*, (*a*) which was an action of *debt* on bond. The defendant prayed oyer of the condition, which recited, that whereas the defendant had aſſigned to the plaintiff a leaſe of a meſſuage and bakehouſe in *Liquorpond Street*, in the pariſh of *St. Andrew, Holborn*, for the term of five years: now if the defendant ſhould not exerciſe the trade of a baker within that pariſh, during the ſaid term, or, in caſe he did, ſhould within three days after proof thereof made, pay to the plaintiff the ſum of 50*l.*, then the ſaid obligation to be void: which being read and heard, he pleaded that he was a baker by trade, that he had ſerved an apprenticeſhip to it, *ratione cujus* the ſaid bond was void in law, *per quod* he did trade *prout ei bene licuit.* Whereupon the plaintiff demurred in law.

And after this matter had been ſeveral times argued at the bar, *Parker*, Ch. J. delivered the reſolution of the court as follows:

"The general queſtion upon this record is, whether this bond, being made in reſtraint of trade, be good? And we are all of opinion, that a ſpecial conſideration being ſet forth in the condi-

* *Vide Com. Dig.* tit. *Trade*, (*D.*) 3. (*a*) 1 *P. Wms.* 181. *Note, this caſe having fully ſettled and eſtabliſhed the law on this ſubject, and put at reſt any ſeeming difference of opinion in former caſes, and thoſe caſes having been noticed and ably commented upon by* Parker, *Ch. J. in delivering the opinion of the Court on this caſe, it is thought unneceſſary to preſent the reader with any other view of thoſe caſes than what is here given of them by the learned judge.*

tion, which ſhows it was reaſonable for the parties to enter into it, the ſame is good; and that the true diſtinction of this caſe is, not between promiſes and bonds, but between contracts with and without conſideration; and that wherever a ſufficient conſideration appears to make it a proper and an uſeful contract, and ſuch as cannot be ſet aſide without injury to a fair contractor, it ought to be maintained, but with this conſtant diverſity, viz. where the reſtraint is general not to exerciſe a trade throughout the kingdom, and where it is limited to a particular place; for the former of theſe muſt be void, being of no benefit to either party, and only oppreſſive, as ſhall be ſhown by and by.

The reſolution of the books upon theſe contracts ſeeming to diſagree, I will endeavour to ſtate the law upon this head, and to reconcile the jarring opinions; in order whereunto, I ſhall proceed in the following method:

1ſt, Give a general view of the caſes relating to the reſtraint of trade;

2dly, Make ſome obſervations from them;

3dly, Show the reaſons of the differences which are to be found in theſe caſes; and

4thly, Apply the whole to the caſe at the bar.

As to the caſes, they are either, firſt, of involuntary contracts, againſt, or without a man's own conſent; or, ſecondly, of voluntary reſtraints, by agreement of the parties. Involuntary reſtraints may be reduced under theſe heads:

1ſt, Grants, or charters from the crown.

2dly, Cuſtoms.

3dly, Bye-Laws.

Grants, or charters from the crown may be,

1ſt, A new charter of incorporation to trade generally, excluſive of all others; and this is void. 8 *Co.* 121.

2dly, A grant to particular perſons for the ſole exerciſe of any known trade; and this is void; becauſe it is a monopoly, and againſt the policy of the common law, and contrary to *Magna Charta.* 11 *Co.* 84.

3dly, A grant of the ſole uſe of a new invented art; and this is good, being indulged for the encouragement of ingenuity: but this is tied up by the ſtatute of 21 *Jac.* 1. *c.* 3. *ſ.* 6. to the term of fourteen years: for after that time it is preſumed to be a known trade, and to have ſpread itſelf among the people.

Reſtraints

Reſtraints by cuſtom are of three ſorts:

1ſt, Such as are for the benefit of ſome particular perſons, who are alleged to uſe a trade for the advantage of a community, which are good. 8 *Co.* 125. *Cro. Eliz.* 803. 1 *Leon.* 142. *Mich.* 22 *H.* 6. 14. 2 *Bulſt.* 195. 1 *Rol. Abr.* 561.

2dly, For the benefit of a community of perſons who are not alleged, but ſuppoſed to uſe the trade, in order to exclude foreigners. *Dyer* 279. *b. W. Jones* 162. 8 *Co.* 121. 11 *Co.* 52. *Carter* 68. 114. held good.

3dly, A cuſtom may be good to reſtrain a trade in a particular place, though none are either ſuppoſed or alleged to uſe it; as in the caſe of *Rippon, Regiſter* 105, 106.

Reſtraints of trade by bye laws, are theſe ſeveral ways:

1ſt, To exclude foreigners; and this is good, if only to enforce a precedent cuſtom by a penalty. *Carter* 68. 114. 8 *Co.* 125. But where there is no precedent cuſtom, ſuch bye-law is void. 1 *Roll. Abr.* 364. *Hob.* 210. 1 *Bulſt.* 11. 3 *Keb.* 808. But the caſe in *Keble* is miſreported; for there the defendants did not plead a cuſtom to exclude foreigners, but only generally to make bye-laws, which was the ground of the reſolution in that caſe.

2dly, All bye-laws made to cramp trade in general, are void. *Moor* 576. 2 *Inſt.* 47. 1 *Bulſt.* 11.

3dly, Bye-laws made to reſtrain trade, in order to the better government and regulation of it, are good in ſome caſes, (*viz.*) if they are for the benefit of the place, and to avoid public inconveniences, nuiſances, &c., or for the advantage of the trade, and improvement of the commodity. *Sid.* 284. *Raym.* 288. 2 *Keb.* 27. 873. and 5 *Co.* 62. *b.*, which laſt is upon the bye-law for bringing all broad-cloth to *Blackwall hall*, there to be viewed and marked; and to pay a penny per piece for marking. This was held a reaſonable bye-law; and, indeed, it ſeems to be only fixing of the market: for one end of all markets is, that the commodity may be viewed; but then they muſt not make people pay unreaſonably for the liberty of trading there.

In 2 *Keb.* 309. the caſe is upon a bye-law, for reſtraining ſilk-throwſters from uſing more than ſuch a certain number of ſpindles; and there the bye-law would have been good, if the reaſons given for it had been true.

Voluntary reſtraints, by agreements of the parties, are either,

1ſt, General, or,

2dly, Particular, as to places or perſons.

General reſtraints are all void, whether by bond, covenant, or promiſe, &c. with or without conſideration, and whether it be of the party's own trade or not. *Cro. Jac.* 596. 2 *Bulſt.* 136. *Allen*, 67.

Particular reſtraints are either, 1ſt, without conſideration, all which are void, by what ſort of contract ſoever created. 2 *H.* 5. 5. *Moor*, 115. 242. 2 *Leon.* 210. *Cro. Eliz.* 872. *Noy*, 98. *Owen* 143. 2 *Keb.* 377. *March* 191. *Show.* 2. (not well reported.) 2 *Saund.* 155.

Or, 2dly, Particular reſtraints are with conſideration.

Where a contract for reſtraint of trade appears to be made upon a good and adequate conſideration, ſo as to make it a proper and uſeful contract, it is good. 2 *Bulſt.* 136. *Rogers* v. *Parry*. Though that caſe is wrong reported, as appears by the roll, which I have cauſed to be ſearched, it is *B. R. Trin.* 11 *Jac.* 1. *Rot.* 223. And the reſolutions of the judges were not grounded upon its being a particular reſtraint, but upon its being a particular reſtraint, with a conſideration; and the ſtreſs lies on the words, as the caſe is here, though, as they ſtand in the book, they do not ſeem material. *Noy*, 98. *W. Jones*, 13. *Cro. Jac.* 596. In that caſe, all the reaſons are clearly ſtated, and, indeed, all the books, when carefully examined, ſeemed to concur in the diſtinction of reſtraints general, and reſtraints particular, and with or without conſideration, which ſtand upon very good foundation. *Volenti non fit injuria*; a man may, upon a valuable conſideration, by his own conſent, and for his own profit, give over his trade, and part with it to another in a particular place.

Palm. 172. *Bragg* v. *Stanner*. The entering upon the trade, and not whether the right of action accrued by bond, promiſe, or covenant, was the conſideration in that caſe.

Vide March's Rep. 77, but more particularly *Allen*'s, 67., where there is a very remarkable caſe, which lays down this diſtinction, and puts it upon the conſideration and reaſon of the thing.

Secondly, I come now to make ſome obſervations that may be uſeful in the underſtanding of theſe caſes; and they are,

1ſt, That to obtain the ſole exerciſe of any known trade throughout *England*, it is a complete monopoly, and againſt the policy of the law.

2dly, That when reſtrained to particular places or perſons, (if lawfully and fairly obtained,) the ſame is not a monopoly.

3dly, That ſince theſe reſtraints may be by cuſtom, and cuſtom muſt have a good foundation, therefore the thing is not abſolutely and in itſelf unlawful.

4thly, That it is lawful, upon good conſideration, for a man to part with his trade.

5thly, That ſince actions upon the caſe are actions *injuriarum*, it has been always held, that ſuch actions will lie for a man's uſing a trade contrary to cuſtom, or his own agreement; for there he uſes it injuriouſly.

6thly, That where the law allows a reſtraint of trade, it is not unlawful to inforce it with a penalty.

7thly, That no man can contract not to uſe his trade at all.

8thly, That a particular reſtraint is not good, without juſt reaſon and conſideration.

Thirdly, I propoſed to give the reaſons of the differences which we find in the caſes: and this I will do,

1ſt, With reſpect to involuntary reſtraints; and,

2dly, With regard to ſuch reſtraints as are voluntary.

As to involuntary reſtraints, the firſt reaſon why ſuch of theſe as are created by grants and charters from the crown and bye-laws, generally are void, is drawn from the encouragement which the law gives to trade and honeſt induſtry, and that they are contrary to the liberty of the ſubject.

2dly, Another reaſon is drawn from *Magna Charta*, which is infringed by theſe acts of power. That ſtatute ſays, *nullus liber homo*, &c. *diſſeiſetur, de libero tenemento vel libertatibus, vel liberis conſuetudinibus, ſuis*, &c., and theſe words have been always taken to extend to freedom of trade.

But none of the caſes of cuſtoms, bye-laws to inforce theſe cuſtoms, and patents for the ſole uſe of a new-invented art, are within any of theſe reaſons: for here no man is abridged of his liberty, or diſſeiſed of his freehold: a cuſtom is *lex loci*; and foreigners have no pretenſion of right in a particular ſociety, exempt from the laws of that ſociety; and, as to new invented arts, nobody can be ſaid to have a right to that which was not in being before; and therefore it is but a reaſonable reward to ingenuity and uncommon induſtry. I ſhall ſhow the reaſon of the differences in the caſes of voluntary reſtraint:

1ſt, Negatively.

2dly, Affirmatively.

1ſt, Negatively. The true reaſon of the diſallowance of theſe in any caſe, is never drawn from *Magna Charta*; for a man may voluntarily, and by his own act, put himſelf out of the poſſeſſion of his freehold; he may ſell it, or give it away at his pleaſure.

2dly, Neither is it a reaſon againſt them, that they are contrary to the liberty of the ſubject: for a man may, by his own conſent, for a valuable conſideration, part with his liberty; as in the caſe of a covenant not to erect a mill upon his own lands. *J. Jones*, 13. *Mich.* 4 *Ed.* 3. 57. And when any of theſe are at any time mentioned as reaſons, upon the head of voluntary reſtraints, they are to be taken only as general inſtances of the favour and indulgence of the law to trade and induſtry.

3dly, It is not a reaſon againſt them, that they are againſt law, I mean in a proper ſenſe; for in an improper ſenſe they are.

All the inſtances of conditions againſt law in a proper ſenſe, are reducible under one of theſe heads:

1ſt, Either to do ſomething that is *malum in ſe*, or *malum prohibitum*. 1 *Inſt.* 206.

2dly, To omit the doing of ſomething that is a duty. *Palm.* 172. *Hob.* 12. *Norton* v. *Sims*.

3dly, To encourage ſuch crimes and omiſſions. *Fitzherb.* tit. *Obligation*. 13 *Bro.* tit. *Obligation*, 34. *Dyer* 118.

Such conditions as theſe, the law will always, and without any regard to circumſtances, defeat; being concerned to remove all temptations and inducements to thoſe crimes: and therefore, as in 1 *Inſt.* 206. a feoffment ſhall be abſolute for an unlawful condition, and a bond void. But from hence I would infer,

1ſt, That where there may be a way found out to perform the condition, without a breach of the law, it ſhall be good. *Hob.* 12. *Cro. Car.* 22. *Perk.* 228.

2dly, That all things prohibited by law may be reſtrained by condition; and therefore, theſe particular reſtraints of trade not being againſt law, in a proper ſenſe, as being neither *mala in ſe*, nor *mala prohibita*, and the law allowing them in ſome inſtances, as in thoſe of cuſtoms and *aſſumpſits*, they may be reſtrained by condition.

2dly, Affirmatively. The true reaſons of the diſtinction upon which the judgments in theſe caſes of voluntary reſtraints are

founded,

founded, are, 1ſt, the miſchief which may ariſe from them, 1ſt, to the party, by the loſs of his livelihood, and the ſubſiſtence of his family; 2dly, to the public, by depriving it of an uſeful member.

Another reaſon is, the great abuſes theſe voluntary reſtraints are liable to; as, for inſtance, from corporations, who are perpetually labouring for excluſive advantages in trade, and to reduce it into as few hands as poſſible; as likewiſe from maſters, who are apt to give their apprentices much vexation on this account, and to uſe many indirect practices to procure ſuch bonds from them, leſt they ſhould prejudice them in their cuſtom, when they come to ſet up for themſelves.

3dly, Becauſe, in a great many inſtances, they can be of no uſe to the obligee; which holds in all caſes of general reſtraint throughout *England:* for what does it ſignify to a tradeſman in *London* what another does at *Newcaſtle?* And ſurely it would be unreaſonable to fix a certain loſs on one ſide, without any benefit to the other. The *Roman* law would not inforce ſuch contracts by an action. See *Puff. Lib.* 5. *c.* 2. ſect. 3. 21 *H.* 7. 20.

4thly, The fourth reaſon is in favour of theſe contracts, and is, that there may happen inſtances wherein they may be uſeful and beneficial; as to prevent a town from being overſtocked with any particular trade; or in caſe of an old man, who, finding himſelf under ſuch circumſtances, either of body or mind, as that he is likely to be a loſer by continuing his trade, in this caſe it will be better for him to part with it for a conſideration, that by ſelling his cuſtom, he may procure to himſelf a livelihood, which he might probably have loſt by trading longer.

5thly, The law is not ſo unreaſonable as to ſet aſide a man's own agreement for fear of an uncertain injury to him; and fix a certain damage upon another, as it muſt do, if contracts with a conſideration were made void. *Barrow* v. *Wood, March Rep.* 77. *Mich.* 7 *Ed.* 3. 65. *Allen*, 67. 8 *Co.* 121.

But here it may be made a queſtion, that ſuppoſe it does not appear whether or no the contract be made upon good conſideration, or be merely injurious and oppreſſive, what ſhall be done in this caſe? I do not ſee why that ſhould not be ſhown by pleading; though certainly the law might be ſettled either way without prejudice; but as it now ſtands, the rule is, that wherever ſuch contract *ſtat indifferenter*, and, for ought appears, may be either

either good or bad, the law preſumes it, *primâ facie*, to be bad, and that for theſe reaſons:

1ſt, In favour of trade and honeſt induſtry.

2dly, For that there plainly appears a miſchief, but the benefit, (if any) can only be preſumed; and in that caſe the preſumptive benefit ſhall be overborne by the apparent miſchief.

3dly, For that the miſchief, as I have ſhown before, is not only private but public.

4thly, There is a ſort of preſumption, that it is not of any benefit to the obligee himſelf; becauſe it being a general miſchief to the public, every body is affected thereby; for it is to be obſerved, that though it be not ſhown to be the party's trade or livelihood, or that he had no eſtate to ſubſiſt on, yet all the books condemn thoſe bonds on that reaſon, (viz.) as taking away the obligor's livelihood, which proves that the law preſumes it; and this preſumption anſwers all the difficulties that are to be found in the books.

As, 1ſt, That all contracts, where there is a bare reſtraint of trade, and no more, muſt be void; but this taking place only where the conſideration is not ſhown, can be no reaſon why, in caſes where the ſpecial matter appears, ſo as to make it a reaſonable and uſeful contract, it ſhould not be good; for there the preſumption is excluded; and therefore the courts of juſtice will inforce theſe latter contracts, but not the former.

2dly, It anſwers the objections, that a bond does not want a conſideration, but is a perfect contract without it; for the law allows no action on a *nudum pactum*, but every contract muſt have a conſideration, either expreſſed, as in *aſſumpſit*, or implied, as in *bonds* or *covenants*; but theſe latter, though they are perfect as to the form, yet may be void as to the matter; as in a covenant to ſtand ſeiſed, which is void without a conſideration, though it be a compleat and perfect deed.

3dly, It ſhows why a contract not to trade in any part of *England*, though with conſideration, is void; for there is ſomething more than a preſumption againſt it; becauſe it can never be uſeful to any man to reſtrain another from trading in all places, though it may be to reſtrain him from trading in ſome, unleſs he intends a monopoly, which is a crime.

4thly, This ſhows why promiſes in reſtraint of trade, have been held good; for in thoſe contracts it is always neceſſary to ſhow the conſideration, ſo that the preſumption of injury could not take

take place, but it muſt be governed by the ſpecial matter ſhown. And it alſo accounts, not only for all the reſolutions, but even all the expreſſions that are uſed in our books in theſe caſes. It at leaſt excuſes the vehemence of Judge *Hall*, in 2 *H.* 5. fol. quinto: for ſuppoſe, as that caſe ſeems to be, a poor weaver having juſt met with a great loſs, ſhould, in a fit of paſſion and concern, be exclaiming againſt his trade, and declare that he would not follow it any more, &c. at which inſtant ſome deſigning fellow ſhould work him up to ſuch a pitch, as, for a trifling matter, to give a bond not to work at it again; and afterwards, when the neceſſities of his family, and the cries of his children, ſend him to the loom, ſhould take advantage of the forfeiture, and put the bond in ſuit; I muſt own, I think this ſuch a piece of villainy, as is hard to find a name for; and therefore cannot but approve of the indignation that judge expreſſed, though not his manner of expreſſing it. Surely it is not fit that ſuch unreaſonable miſchievous contracts ſhould be countenanced, much leſs executed by a court of juſtice.

As to the general indefinite diſtinction made between bonds and promiſes, in this caſe, it is, in plain words, this; that the agreement itſelf is good, but when it is reduced into the form of a bond, it immediately becomes void, but for what reaſon, ſee 3 *Lev.* 241. Now a bond may be conſidered two ways, either as a ſecurity, or as a compenſation; and

1ſt, Why ſhould it be void as a ſecurity? Can a man be bound too faſt from doing an injury? which I have proved the uſing of a trade, contrary to cuſtom or promiſe, to be.

2dly, Why ſhould it be void as a compenſation? Is there any reaſon why parties of full age, and capable of contracting, may not ſettle the quantum of damages for ſuch an injury? *Bract. lib.* 3. *c.* 2. *ſ.* 4.

It would be very ſtrange that the law of *England*, that delights ſo much in certainty, ſhould make a contract void when reduced to certainty, which was good when looſe and uncertain. The caſes in *March's Rep.* 77. 191. and alſo *Show.* 2. are but indifferently reported, and not warranted by the authorities they build upon.

1ſt Objection. In a bond, the whole penalty is to be recovered; but in *aſſumpſit* only the damages. But I anſwer that this objection holds equally againſt all bonds whatſoever.

2d

2d Objection. Another objection was, that this is like the caſe of an infant, who may make a promiſe, but not a bond; or that of a ſheriff, who cannot take a bond for fees. To this I anſwer, that the caſe of an infant ſtands on another reaſon, (viz.) a general diſability to make a deed; but here both parties are capable: neither is it the nature of the bond, but merely the incapacity of the infant, which makes a bond by him void, ſince there a ſurety would be liable; but it is otherwiſe here.

Alſo the caſe of a ſheriff is very different; for at common law he could take nothing for doing his duty, but the ſtatute has given him certain fees; but he can take neither more, nor a chance for more than that allows him.

3d Objection. It was further objected, that a promiſe is good, and a bond void; becauſe the former leaves the matter more at large to be tried by a jury; but what is there to be tried by a jury in this caſe? I anſwer, firſt, it is to be tried whether, upon conſideration of the circumſtances, the contract be good or not? And that is matter of law, not fit for a jury to determine.

2dly, It is to aſcertain the damages; but *cui bono* (ſay they) ſhould that be done? Is it for the benefit of the obligor? Certainly it may be neceſſary, on that account, for theſe reaſons:

1ſt, A bond is a more favourable contract for him than a promiſe; for the penalty is a re-purchaſe of his trade, aſcertained beforehand, and on payment thereof he ſhall have it again. He may rather chuſe to be bound not to do it, under a penalty, than not to do it at all.

2dly, However it be, it is his own act.

3dly, He can ſuffer only by his knavery; and ſurely courts of juſtice are not concerned leſt a man ſhould pay too dear for being a knave.

4thly, Reſtraints by cuſtom may (as I have proved) be inforced with penalties, which are impoſed without the party's conſent, nay by the injured party, without the concurrence of the other; and if ſo, then *à fortiori* he may bind himſelf by a penalty.

It may, perhaps, be objected, that a falſe recital of a conſideration in the condition, may ſubject a man to an inconvenience, which the law ſo much labours to prevent. But this is no more to be preſumed than falſe teſtimony, and, in ſuch a caſe, I ſhould

I ſhould think the defendant might aver againſt it: for though the rule be, that a man is eſtopped from averring againſt any thing in his own deed, yet that is ſuppoſing it to be his deed; for where it is void, it is otherwiſe, as in the caſe of an uſurious contract.

The application of this to the caſe at bar is very plain: here the particular circumſtances and conſideration are ſet forth, upon which the court is to judge, whether it be a reaſonable and uſeful contract.

The plaintiff took a baker's houſe, and the queſtion is, whether he or the defendant ſhall have the trade of this neighbourhood? The concern of the public is equal on both ſides. What makes this the more reaſonable, is, that the reſtraint is exactly proportioned to the conſideration, (viz.) the term of five years.

To conclude: In all reſtraints of trade, where nothing more appears, the law preſumes them bad; but if the circumſtances are ſet forth, that preſumption is excluded, and the Court is to judge of thoſe circumſtances, and determine accordingly; and if upon them it appears to be a juſt and honeſt contract, it ought to be maintained.

For theſe reaſons we are of opinion, that the plaintiff ought to have judgment.

The principle of this caſe was afterwards recognized and adopted in the caſe of *Cheſman* and *Elizabeth* his wife, v. *Nainby* in error, (*b*) which was an action brought by the defendant in error againſt the plaintiff in error in *Eaſter* Term 1725, in the Court of *Common Pleas* on a bond dated the 5th of *October* 1721, for 100*l.* entered into by *Elizabeth*, when unmarried, to the defendant. To this action the plaintiffs pleaded, and ſet forth the condition of the bond which was in the words following, viz. "Whereas the above "named *Margery Nainby*, at the ſpecial inſtance and requeſt of "the above bounden *Elizabeth Vickers*, is to take her the ſaid *Eli-* "*beth Vickers*, for her hired ſervant, to attend in her ſhop, and "to inſpect her cuſtomers there, and to ſhow her goods, and "further to ſtand by and aſſiſt her the ſaid *Margery* in her "ſaid trade and buſineſs of a linen-draper, whereby it is pre-"ſumed the ſaid *Elizabeth*, if ſhe continues any length of time "in the ſaid ſervice of the ſaid *Margery*, may become a perfect "and knowing perſon in the ſaid trade and myſtery. And

(*b*) 1 *Bro. P. C.* 234. 2 *Stra.* 739. 2 *Lord Raym.* 1456. *S. C.*

"whereas

" whereas the ſaid *Margery Nainby*, conſents to hire and take " her the ſaid *Elizabeth Vickers*, upon and in conſideration only, " upon the expreſs promiſe and agreement of the ſaid *Elizabeth*, " that ſhe ſhall not, nor will, at any time, after ſhe ſhall have " left the ſervice of her the ſaid *Margery*, ſet up or exerciſe " the ſaid trade or myſtery, of a linen-draper, either by herſelf, " or by any other perſon or perſons in truſt for her, or for " her uſe, either directly or indirectly, in any ſhop, room or " place, *within the ſpace of half a mile of the now dwelling houſe of* " *the ſaid Margery Nainby*, ſituate in *Drury Lane*, or of any " other houſe that ſhe the ſaid *Margery Nainby*, her executors " or adminiſtrators, ſhall think proper to remove to, in order to " carry on the ſaid trade of a linen-draper; nor ſhall ſhe, the ſaid " *Elizabeth*, *within the ſame ſpace of half a mile*, directly or indi- " rectly, be concerned in, or aſſiſt or inſtruct any other perſon " or perſons in the managing and carrying on the ſaid trade, un- " der colour or pretence of being a ſervant to ſuch perſon or " perſons, or under any other colour or pretence whatever. " Which ſaid expreſs promiſe and agreement, joined with the " good character and opinion that ſhe the ſaid *Margery* hath of " the integrity and honeſty of her the ſaid *Elizabeth*, is the ſole " conſideration and inducement that has obliged the ſaid *Mar-* " *gery* to take the ſaid *Elizabeth* into her ſervice for the ſpace of " three years. Now the condition of the above obligation is " ſuch, that if the ſaid *Elizabeth Vickers* ſhall act contrary to and " in breach of the above recited promiſe and agreement, accord- " ing to the true intent, and meaning thereof, or of any part there- " of; that then and in ſuch caſe, the ſaid *Elizabeth Vickers*, her " executors and admini rators, ſhall thereupon pay, or cauſe to " be paid unto the ſaid *Margery Nainby*, her executors, adminiſtra- " tors, and aſſigns, the full and juſt ſum of 100*l.* of good and " lawful money of *Great Britain* without fraud or further delay, " the ſaid ſum of 100*l.* being the conſideration money which is " computed the ſaid *Margery Nainby* might reaſonably expect " with an apprentice to the ſaid trade; that then this obligation " to be void, otherwiſe to be and remain in full force and virtue " in law." And then the plaintiffs pleaded, that the ſaid *Eliza-* *beth* continued in the ſervice of the ſaid *Margery Nainby* to the 28th of *April* 1724, and then departed, and left the ſaid ſervice; and that the ſaid *Margery* continued to reſide and exerciſe her trade in her ſaid dwelling houſe in *Drury Lane*, from the time of

making

making the ſaid bond, to the day of ſuing out the original writ; and that ſhe the ſaid *Elizabeth*, *within the ſpace of half a mile from the ſaid dwelling-houſe of the ſaid Margery*, at any time after the departure of the ſaid *Elizabeth* from the ſervice of the ſaid *Margery*, directly, or indirectly, was not concerned in or aſſiſted, or inſtructed any perſon or perſons whatſoever in managing or exerciſing the trade aforeſaid, under colour or pretence of being a ſervant to ſuch perſon or perſons, or under any other colour or pretence whatſoever. And further, that ſhe the ſaid *Elizabeth*, at any time after her departure from the ſervice of the ſaid *Margery*, did not uſe or exerciſe the ſaid art or trade, either by herſelf, or any other perſon or perſons in truſt for her, or for her uſe, either directly, or indirectly, in any ſhop, room, or place, *within the ſpace of half a mile from the dwelling-houſe of the ſaid Margery.*

To this plea, the defendant *Nainby* replied, that the ſaid *Elizabeth*, from the time of making the ſaid bond, continued and remained, in the ſervice aforeſaid, and from thence departed and left her ſaid ſervice, as the ſaid plaintiffs above alledged; and that the defendant *Margery Nainby* continued to inhabit, reſide, and exerciſe her trade, in manner as the ſaid plaintiffs by their plea alleged. But the defendant further ſaid, that the ſaid *Elizabeth within the ſpace of half a mile from the dwelling houſe of the ſaid Margery*, in the ſaid plea above mentioned, and within nine months after the departure of the ſaid *Elizabeth* from the ſervice aforeſaid, did aſſiſt and inſtruct a certain perſon, viz. the ſaid *David Cheſman*, in managing and exerciſing the trade aforeſaid, in the condition abovementioned, againſt the tenor of the ſaid condition, to wit in *Drury Lane* in the pariſh of *St. Giles* in the Fields. And on this iſſue was joined.

At the ſittings after *Eaſter* Term 1725, the cauſe was tried before the Lord Chief Juſtice *King*, when upon full evidence given, and after a full defence made, a verdict was found for the plaintiff in that action.

In *Trinity* Term following, the defendants moved the Court of *Common Pleas* in arreſt of judgment; under pretence, that the bond was void in law: but upon hearing counſel on both ſides the court unanimouſly gave judgment for the ſaid *Margery Nainby*; and judgment was accordingly ſigned and entered up of record.

The defendants therefore brought a writ of error in the *King's Bench*, and upon argument in *Hilary* term 1726, the judgment was

was affirmed, by the unanimous opinion of all the judges of that court. Whereupon they b ought a writ of error in *Parliament*, to reverſe both theſe judgments, and to that end it was inſiſted on behalf of the plaintiffs in error, that the bond was void in law, being a reſtraint of the plaintiff *Elizabeth* in her trade, either as miſtreſs or ſervant; and that not only within the ſpace of half a mile from the dwelling houſe of the defendant, but of any other houſe, which ſhe, her executors, or adminiſtrators ſhould think fit to remove to, at any time, after the plaintiff *Elizabeth*, ſhould have left her ſervice, by which might be meant any part of *England*, or any time during the plaintiff's life. That it would be of dangerous conſequence to allow maſters or miſtreſſes to exact or take ſuch bonds from their ſervants; and in this particular caſe, the breach was for aſſiſting her huſband, which, conſidering the ſubjection of the wife to the huſband, and which could not well be avoided, made the proſecution on this bond the more unreaſonable.

On the other ſide it was contended, that contracts entered into between two perſons to reſtrain one of them from ſetting up or exerciſing a particular trade or employment within a certain limited diſtrict, and for a valuable conſideration, were valid in law, and had been ſolemnly adjudged to be ſo. And therefore it was hoped, that the judgments would be affirmed with coſts.

Accordingly, after hearing counſel on this appeal, and the unanimous opinion of all the Judges having been delivered, upon a point of law to them propoſed, it was ordered and adjudged, that the judgment of affirmance given in the court of *King's Bench*, affirming the judgment given in the Court of *Common Pleas*, ſhould be affirmed, with 40*l.* coſts.

So, in the caſe of *Davis* v. *Maſon*, (*c*) where the condition of the bond was in conſideration that the plaintiff would take the defendant as an aſſiſtant in his buſineſs as a ſurgeon, for ſo long a time as it ſhould pleaſe the plaintiff, the defendant agreed not to practiſe on his own account for 14 years within 10 miles of the place where the plaintiff lived; the bond was held good.

(*c*) 5 *Term Rep.* 118. *Vide* Clerke v. Comer, *Hardw.* 53, *and* Sloman v. Walter, 1 *Bro. Ch. C.* 418. *S. P.*

CHAPTER

CHAPTER XVII.

Of Agreements not to take Advantage of a Communication of the Particulars of a new Invention, &c.

IF a perſon deſirous of being acquainted with the particulars of a new invention, promiſes, in conſideration of being informed thereof by the inventor, not to avail himſelf or take any advantage of ſuch communication, he is liable to be ſued on ſuch promiſe if he afterwards takes any undue advantage of the communication made to him.

Thus in the caſe of *Smith* v. *Dickinſon* (*a*) which was an action of *aſſumpſit*. The declaration ſtated that before the making of the promiſes, &c. the plaintiff had contrived various articles in the buſineſs of a ſadler, which he fully conceived to be new and valuable improvements; and in particular he had before then invented a certain ſpring apparatus for girthing ſaddles, and at the time of the making the promiſes, &c. the plaintiff was deſirous of obtaining his Majeſty's letters patent, for the ſole uſe and benefit of the ſaid invention for a certain term to be ſpecified in the ſaid letters patent, of which the defendant had notice, and whereas the defendant was deſirous of being made acquainted with the nature of the ſaid invention; in conſideration of the premiſes, and alſo in conſideration that the plaintiff would communicate the nature of the invention to the defendant, the defendant undertook that he would not avail himſelf or take any advantage of ſuch communication under the penalty of 1000*l.* It then averred, that the plaintiff confiding in the defendant's promiſe, did communicate to him the nature of the ſaid invention, but that the defendant not regarding, &c. but intending to injure the plaintiff wrongfully, &c. diſcloſed and made known the nature of the ſaid in-

(*a*) 3 *Boſ. & Pul.* 630.

vention, and obtained his majeſty's letters patent for the ſole uſe and benefit of the ſaid invention for the term of 14 years, as being the invention of him the defendant, and thereby availed himſelf and took an undue advantage of the communication made to him as aforeſaid: whereby the defendant became liable to pay 1000*l.* according to his agreement; yet that the defendant had not paid, &c.

The ſecond count was the ſame as the firſt, with the addition of an allegation that the plaintiff ſuſtained ſpecial damage by being prevented from taking out letters patent in his own name, and thereby loſt great profit.

The cauſe was tried before Lord *Alvanley*, Ch. J. when it was proved, that the plaintiff having invented the ſpring apparatus, the defendant called upon him, and expreſſed himſelf extremely deſirous to be informed of the nature of the invention; that the plaintiff communicated the invention to the defendant upon his ſigning the following agreement: "*Thomas Smith*, of No. 119, *New Bond Street*, ſadler, having contrived various articles in the above branch, he fully conceives to be new and valuable improvements, Mr. *Robert Dickenſon*, of No. 55, *Long Acre*, being deſirous of being made acquainted with one of the above mentioned improvements, which Mr. *D.* fully comprehends under the title ſpring apparatus to anſwer or produce the ſame effect as thoſe for which Mr. *Robert Dickenſon* has already obtained the *King*'s patent, he, *Robert Dickenſon* doth hereby promiſe and bind himſelf not to avail himſelf or take any advantage of ſuch communication under the penalty of breach of honour and 1000*l.*" That the defendant immediately on getting this information, entered a *caveat* againſt any perſon but himſelf taking out a patent for the above invention, and ſhortly after took out a patent for it in his own name, though it had been agreed between him and the plaintiff, that they ſhould jointly ſhare the profits of the invention, but the patent ſhould be taken out in the name of the plaintiff. That the defendant being unable to make out a ſpecification in order to maintain his patent, obtained another interview at a houſe in *Soho Square* with the plaintiff, at which it was agreed that they ſhould be jointly concerned in the invention, the plaintiff being employed to make all the ſaddles; and that the patent which had been taken out in the name of the defendant, ſhould continue in his name. That upon the faith of this agreement the plaintiff aſſiſted in making out the ſpecification, which

was

was duly enrolled. That the plaintiff ſhortly after finding the defendant was uſing the patent for his own benefit ſolely, wrote to him upon the ſubject, and received from him the following anſwer,: "Sir, I am unconſcious of any contract at preſent between us, nor can Mr. *N.* or Mr. *F.* (two perſons who had been at the interview, when the ſpecification was drawn out) help me to the recollection of any, although you refer me to them for that purpoſe. The two inventions for which I have obtained patents are my own inventions. Prior to my giving you a paper not to practiſe any invention you might communicate, I had depoſited a drawing in the hands of a friend, and had a workman actually employed in making the article for which my laſt patent is obtained, and this drawing was depoſited for the purpoſe of proving, ſhould it be neceſſary, what my deſign and invention conſiſted of prior to any communication from you, left even if it ſhould be the ſame, I might ſtill go on to obtain my patent. How far your invention reſembled mine is of no conſequence. I went on with my own, your communication had in it nothing new, therefore I do not conſider myſelf as uſing your invention but my own." Upon this caſe it was objected by the counſel for the defendant that the *gravamen* laid in the declaration did not correſpond with that which was in evidence before the jury; but his Lordſhip refuſed to nonſuit the plaintiff; and the jury found a verdict for the plaintiff for 300*l.* the defendant agreeing to aſſign the patent to the plaintiff for the remainder of the term at the defendant's own expence. The plaintiff was to be at liberty to enter a verdict for 1000*l.* if the court ſhould be opinion that the ſum of 1100*l.* mentioned in the agreement was in the nature of liquidated damages, and not a penalty; and if the court ſhould be of opinion that the defendant had not taken an undue advantage of the plaintiff, a nonſuit was to be entered.

The caſe afterwards came before the court of *Common Pleas*, and they expreſſed themſelves clearly of opinion that the word "*penalty*" uſed in the agreement effectually prevented them from conſidering the ſum mentioned as liquidated damages; and upon the other point they determined in favour of the plaintiff.

Lord *Alvanley*, C. J. ſaid: "This is an action for the breach of an agreement; and the queſtions are, firſt, whether the evidence proved that the defendant took any undue advantage of the communication made to him by the plaintiff; and ſecondly, whether the advantage taken by the defendant, ſuppoſing it to be an

undue advantage correſponds with the breach laid in the declaration? It appears that the defendant came to the plaintiff in order to obtain a knowledge of his invention, and was extremely anxious that ſome terms ſhould be entered into between them, and at the ſame time he agreed not to take any undue advantage of the communication made. It was then underſtood that the patent was to be taken out in the name of the plaintiff. Let us ſee then what was the firſt uſe which the defendant made of his knowledge, there being at that time no contract in exiſtence between them reſpecting any participation of profit in the invention. He immediately enters a *caveat* to prevent any other perſon but himſelf from taking out the patent. This was an improper uſe made of the diſcovery, upon which the plaintiff might have brought an action, though it is uncertain what damages he could have recovered. The defendant then obtains a patent in his own name, but being unable to make out the ſpecification, he tempts the plaintiff under pretence of offering him certain advantages to complete the diſcovery. This was only a continuation of the ſame fraud; for as ſoon as he has made out his ſpecification from the information afforded him by the plaintiff, he refuſes to execute any articles of partnerſhip, alleging that he had obtained the patent upon a ſpecification previouſly depoſited in the hands of a friend. It is urged that the plaintiff agreed to releaſe all breach of the firſt agreement, not to take any undue advantage of the communication, upon the defendant entering into certain terms, and that the defendant is only guilty of a breach of thoſe terms. Poſſibly thoſe terms never were reduced into writing, and yet the plaintiff is called upon to wave his remedy on the firſt agreement, without any power of enforcing the ſecond. It does appear to me, however, that although if there had been a formal releaſe of the remedy under the firſt agreement he muſt have been barred, yet as the patent was allowed to remain in the name of the defendant only, upon the performance of certain conditions, the performance of which has not been ſhown, the plaintiff may reſort to the breach of the firſt agreement, of which the defendant appears, by the evidence, to have been guilty. Indeed, the defendant's letter to the plaintiff puts the queſtion out of all doubt, for he there inſiſts upon the invention as his own, and repudiates any ſubſequent agreement, and juſtifies having taken out the patent in his own name as for an invention of his own. If a man give a bond for the performance of covenants,

and

and the covenants being broken, the obligee agrees not to put the bond in ſuit upon the undertaking of the obligor to do certain things, and then the obligor refuſes to perform his undertaking, can it be ſaid that the bond is gone? Certainly not. So in this caſe, the ſubſequent agreement was a conditional agreement, and as the conditions were not performed, the action may be maintained upon the original agreement."

CHAPTER XVIII.

Of Wagers.

ALL wagers are deemed legal, except ſuch as have a tendency to injure the character or feelings of third perſons, or which may excite to a breach of the peace; and except alſo ſuch as are *contra bonos mores*, or againſt the rules of ſound policy and morality, or in violation of any act of parliament: and the winner may recover the money, if fairly loſt, by an action of *aſſumpſit* on mutual promiſes.

The caſes on this ſubject, ſo far as they relate to the action of *aſſumpſit*, may be claſſed in the following order:

1. *Of Wagers concerning Third Perſons.*
2. ——— *War or Peace.*
3. ——— *the Duties on Hops.*
4. ——— *the Event of an Election.*
5. ——— *a Judicial Determination.*
6. ——— *Horſe Races.*
7. ——— *Foot Races.*
8. ——— *Games of Play; and of Money won at Play.*

1. *Of*

1. *Of Wagers Concerning Third Perſons.*

It has been determined, that a wager between two ſons, as to which of their fathers ſhould happen to die firſt, is not illegal; nor is it any objection that the father of one of the young men was dead at the time of laying the wager, provided it was then unknown to both the ſons.

Thus, in the caſe of Earl *March* v. *Pigot*, (*a*) which was an action of *aſſumpſit* upon a wager. The cauſe was tried before Lord *Manſfield*; and the caſe was as follows:—It was a contract made at *New-market*; and the wager was originally propoſed between young Mr. *Pigot*, the preſent defendant, and young Mr. *Codrington*, to run their fathers (to uſe the phraſe of that place,) each againſt the other. Sir *William Codrington*, the father of Mr. *Codrington*, was then a little turned of fifty; Mr. *Pigot*'s father was upwards of ſeventy. Lord *Oſſory* computed the chances, according to the abovementioned ages of their reſpective fathers. Mr. *Codrington* thought the computation was made too much in his diſfavour; whereupon Lord *March* agreed to ſtand in Mr. *Codrington*'s place; and reciprocal notes were accordingly given between the Earl and Mr. *Pigot*. Mr. *Pigot*'s note ran thus: "I promiſe to pay to the Earl of *March*, five hundred guineas, "if my father dies before Sir *William Codrington*. *William Pigot*." "The Earl's was, "I promiſe to pay to Mr. *Pigot*, one thouſand "ſix hundred guineas, in caſe Sir *William Codrington* does not "ſurvive Mr. *Pigot*'s father. *March*."—No mention was made, at the time of this tranſaction, about their fathers being then dead or alive; but the fact was, that Mr. *Pigot*'s father was then actually dead. He died in *Shropſhire*, one hundred and fifty miles from *London*, at two o'clock in the morning of the ſame day on which this bet was made at *Newmarket*, after dinner. However, this fact was not at that time at all known to any of the parties, nor was there any reaſon for ſuſpecting that Mr. *Pigot*'s father was then dead. There was no objection made at the trial

(*a*) 5 *Burr.* 2802. *Note, an action of* indebitatus aſſumpſit *will not lie for money won on a wager; it muſt be a ſpecial* aſſumpſit *upon the conſideration of mutual promiſes. Vide* 3 *Salk.* 14. 176. 6 *Mod.* 128, 12 *Mod.* 69. 81. 258. 1 *Ld. Raym.* 69. *Carth.* 338.

againſt going into parol evidence. Lord *Mansfield* left it to the jury, who found a verdict for the plaintiff, with 525*l.* damages.

Upon a motion for a new trial, it was objected, that the contract was void: It was without any conſideration; for there was no poſſibility of the defendant's winning, (his father then being actually dead,) and therefore he ought not to loſe. It was a contract in *futuro*, manifeſtly made upon the ſuppoſition of a then future contingency. The meaning can't be doubted; and the words ſufficiently expreſs that meaning. "If my father dies before Sir "*William Codrington*," is equivalent to ſaying, "If my father "ſhall die before Sir *William Codrington*." But his father was dead before he entered into this contract. But the Court were of opinion that the verdict was right, and therefore refuſed to grant a new trial. And Lord *Mansfield*, Ch. J. ſaid, "The queſtion is, "what the parties really meant?" The material contingency was, "which of theſe two young heirs ſhould come to his father's eſtate firſt?" It was not known that the father of either of them was then dead. Their lives, their healths, were neither warranted nor accepted. It was equal to both of them whether both of their fathers ſhould be then ſick or dead. All the circumſtances ſhow, that if it had been thought of, it would not have made any difference in the bet; and there was no reaſon to preſume that they would have accepted it. The intention was, that he who came firſt to his eſtate ſhould pay this ſum of money to the other, who ſtood in need of it; that the event which had happened was in the contemplation of neither party. Both notes are ſo penned, as to be applied to what was to happen: but the nature of ſuch a contract, and the manifeſt intention of the parties, ſupport the verdict of the jury, (to whom it was left, without objection,) "that he who ſucceeded to his eſtate firſt, by the death of his father, ſhould pay to the other," without any diſtinction, whether the event had or had not, at that time, actually happened.

Aſhton, J. "It was originally to be a bet between two young heirs apparent; and the material point to be ſettled was to fix the difference of the chances of the ſurvivorſhip of their fathers. The mere ſurvivorſhip was the thing intended to be betted upon; the jury were the proper judges of the intention of the bet; and they have determined what that intention was. If it had

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ſtood ſingly upon the defendant's note, I ſhould have thought it not to be a good promiſe at the time of giving it: but taking the evidence and all the circumſtances together, it was proper to be left to the jury; and the jury taking the circumſtances into conſideration, (and it was thought proper to take them into conſideration) have determined it. I ſee no ground for granting a new trial."

So, a wager that *A.* had purchaſed a waggon of *B.* is neither void at common law, nor prohibited by ſtat. 14 *Geo.* 3. *c.* 48.; and an action may be maintained upon it.

Thus, in the caſe of *Good* v. *Elliot*, (*b*) which was alſo an action of *aſſumpſit*. The firſt count ſtated, that there was a diſcourſe between the plaintiff and defendant, concerning a waggon, lately belonging to *David Coleman*; and the queſtion was, whether one *Suſannah Tye* had or had not, before a certain day, bought the waggon; that the defendant betted the plaintiff five guineas that *S. Tye* had, before that time, bought the waggon; and that the plaintiff betted the defendant five guineas that *S. Tye* had not before that time, bought the waggon; that the bet was to be decided by *D. Coleman* and *S. Tye*; that each depoſited 1*l.* in the hands of one *E. Heath*, to be paid to the plaintiff, in caſe *D. Coleman* and *S. Tye* ſhould ſay and determine that *S. Tye* had not, before that time, bought the waggon, or to the defendant, in caſe they ſhould ſay that he had, &c. There were other counts, laying the wager in different forms, but in ſubſtance the ſame. Plea *non aſſumpſit*: upon which a verdict was found for the plaintiff; but a motion was afterwards made for a rule to ſhow cauſe why the judgment ſhould not be arreſted upon two grounds, firſt, that the wager was void at common law; and, ſecondly, that it was void by the ſtatute 14 *Geo.* 3. *c.* 48.

Three of the judges, viz. *Kenyon*, Ch. J., *Aſhhurſt*, and *Groſe* were of opinion that the wager was good at common law, and not within the ſtat. 14 *Geo.* 3. *c.* 48.; but *Buller*, J. differed in opinion upon the firſt objection, and contended that the wager was bad at common law.

(*b*) 3 *Term Rep.* 693.

But

But a wager reſpecting the ſex of a third perſon is illegal.

Thus, in the caſe of *Da Coſta* v. *Jones*, (*m*) which was an action of *aſſumpſit* upon a wager between the plaintiff and defendant reſpecting the ſex of Monſieur *le Chevalier D'Eon*. The declaration ſtated, that the defendant on the 4th of *October*, 1771, in conſideration that the plaintiff would then and there pay him *ſeventy-five guineas*, undertook to pay to the plaintiff 300*l.* in caſe the *Chevalier* ſhould, at any time, prove to be a *female*. The cauſe was tried before Lord *Mansfield*, at *Guildhall*, at the ſittings after *Michaelmas Term*, 1777, when the jury found a verdict for the plaintiff, damages 300*l.* But a motion was afterwards made in arreſt of judgment upon two grounds. 1ſt, Becauſe it was a wager upon a queſtion tending to introduce indecent evidence; and 2dly, becauſe it materially affected the intereſt of a third perſon. The Court determined that the wager was illegal; and the judgment was accordingly arreſted.

Lord *Mansfield*, Ch. J. ſaid: 'This caſe, upon the trial of the firſt cauſe, made a great noiſe all over *Europe*. And ſoon afterwards I own I was ſorry that the anſwer given to the objection, made at the trial, 'that it appeared on the record,' had been ſo haſtily given way to by me. I was ſorry that the nature of the action had not been more fully conſidered. I was ſorry for another thing; that the witneſſes who were ſubpœnaed had not been told, they might refuſe to give evidence if they pleaſed. But no objection was made on their behalf by the counſel for the defendant, nor did any of themſelves apply for protection, or heſitate to anſwer. I have ſince heard that many of them were confidential perſons, ſervants, and others employed in the way of their profeſſion and buſineſs. Had any of them demurred it would have opened the nature of the action. That two men, by laying a wager concerning a third perſon, might compel his phyſicians, relations, and ſervants to diſcloſe what they knew relative to the ſubject matter of that wager, would have been an alarming propoſition; the bare ſtating it would have ſtartled me. Indeed the objection being put upon the general crude ground of the cauſe leading to indecent evidence, and not upon the ſpecial nature of this caſe, did not ſtrike me. For indecency of evidence is no objection to its being received where it is neceſſary to the deci-

(*m*) *Cowp.* 729.

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ſion of a *civil* or *criminal* right: and upon that ground we think Mr. Juſtice *Burnett* did wrong in rejecting the caſe that came before him; for there the party had received an injury. But if it had been an action upon a wager, whether ſuch a woman had ſuch a defect or infirmity, it would have been nearly the preſent caſe. *Indifferent wagers upon indifferent matters, without intereſt to either of the parties, are certainly allowed by the law of this country, in ſo far as they have not been reſtrained by particular Acts of Parliament:* and the reſtraints impoſed in particular caſes, ſupport the general rule. For where parliament interpoſes and ſays, 'unleſs you have an intereſt in ſuch a caſe, any wager or inſurance upon it ſhall be void and of no effect;' it implies, that in caſes not ſpecially prohibited by Act of Parliament, parties may wager or inſure at pleaſure. And this ſpecies of contract has, in fact, gone to an extent that is much complained of. Whether it would not have been better policy to have treated all wagers originally as gaming contracts, and ſo have held them void, is now too late to diſcuſs: they have too long and too often been held good and valid contracts. But notwithſtanding they have been ſo generally entertained, there muſt be a variety of inſtances where the voluntary act of two indifferent parties, by laying a wager, ſhall not be permitted to form a ground for an action, or a judicial proceeding in a court of juſtice. Suppoſe a wager between two people, that one of them, or that a third perſon, ſhall do a criminal act, to go from ſtronger caſes to thoſe that are leſs ſtrong. 'I lay you a wager, you do not beat ſuch a perſon. You lay that you will:' ſuch a wager would be void: becauſe it is an incitement to a breach of the peace. Suppoſe the ſubject a matter of a wager were a violation of chaſtity, or an immoral action: 'I lay I ſeduce ſuch a woman.' Would a court of juſtice entertain an action upon ſuch a wager? Moſt clearly not; becauſe it is an incitement to immorality. Suppoſe a wager upon a ſubject *contra bonos mores*, like the caſe of Sir *Charles Sedley*; would a court of juſtice try a wager that incites to ſuch indecency? It may be ſaid, there are no adjudged caſes; but you offend, you miſbehave by laying ſuch a wager. To come nearer to the point: Suppoſe a wager that affects the intereſt or feelings of a third perſon; which is one of the grounds upon which the motion for a new trial in this caſe has been argued. For inſtance; that ſuch a woman has committed adultery. Would a court of juſtice try the adultery in an action upon

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ſuch a wager? Or a wager that an unmarried woman has had a baſtard? Would you try that? Would it be endured? Moſt unqueſtionably it would not. Becauſe it is not only an injury to a third perſon, but it diſturbs the peace of ſociety; and in either of theſe two laſt caſes, the party to be affected by it would have a right to ſay, how dare you bring my name in queſtion? If a huſband complains of adultery, he ſhall be allowed to try it; becauſe he is the party injured. So, if it be neceſſary to juſtice to try whether ſuch a one is a baſtard, it ſhall be tried. But third perſons, merely for the purpoſe of laying a wager, ſhall not thus wontly expoſe others to ridicule, and libel them under the form of an action.

"We then come to the preſent caſe, which is ſhortly this. Here is a perſon who appears to all the world to be a man; is ſtated upon the record to be 'Monſieur *Le Chevalier D'Eon;*' has acted in that character in a variety of capacities: and has his reaſons and advantages in ſo appearing. Shall two indifferent people, by a wager between themſelves, injure him, ſo as to try in an action upon that wager, whether (as was ſaid in the argument) he is a cheat and impoſtor; or ſhow that he is a woman, and be allowed to ſupœna all his intimate friends and confidential attendants to give evidence that will expoſe him all over *Europe*? It is monſtrous to ſtate. It is a diſgrace to judicature. And if the *Chevalier*, by application to the court or otherwiſe, had come and ſaid, here is a villianous wager laid to injure me, I pray the Court, as a third perſon whoſe intereſt it affects, to ſtop it; the Court would inſtantly have done it. Upon the ſame principle as the Court ſtayed the proceedings, upon the application of Mr. *Mailman*, in the caſe of *Cowe* v. *Phillips*. (*n*) Wherever a queſtion ariſes upon a real matter of right, though the intereſt of third perſons, not parties, may be affected by it, it ſhall be tried. If a witneſs lays a wager upon the ſubject matter in diſpute between a third perſon, it does not affect his evidence ſo as to defeat either party of it.

"I think the other ground is material. The queſtion is upon the ſex of a perſon, to the appearance of all the world a man; and who for reaſons of his own, thinks proper to keep his ſex a ſecret. The medium of proof, upon ſuch a queſtion, muſt ariſe from the circumſtances that diſtinguiſhes the ſexes. This neceſſarily tends to introduce all the indecent evidence ſuch an inquiry

(*n*) *Cas. Temp. Hardw.* 237.

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can involve. Suppoſe two perſons were to lay a wager upon a mark or defect in a woman's body. Will the Court ſay they will ſuffer her chambermaid to be called to give evidence upon ſuch a queſtion? The caſe, mentioned in the argument, of an inſurance by two ſons upon the lives of their reſpective fathers, and other caſes, where the life of one perſon is run againſt another, are not caſes that injure or affect the individuals who happen to be made the ſubject of ſuch a wager. They are no reflection or injury to them. So, a wager whether the next child ſhall be a boy or a girl, hurts no one. But the preſent caſe is indecent in itſelf, and manifeſtly a groſs injury to a third perſon; therefore, ought not to be endured. We think the objection appears ſufficiently upon the record, and that there is ground enough upon theſe allegations to arreſt the judgment."

2. *Of Wagers Concerning War or Peace.*

In the caſe of *Foſter* v. *Thackery*, (*o*) an action was brought upon a wager that war would be declared againſt *France* within three months; the opinion of the twelve judges was taken on the point, whether ſuch a wager was void under the ſtat. 14 *Geo.* 3. *c.* 48. The courts of *King's Bench* and *Common Pleas* were of opinion that it was; and the court of *Exchequer contra* But no judgment was ever given on the caſe.

3. *Of Wagers Concerning the Duties on Hops.*

A wager reſpecting the future amount of any branch of the public revenue is illegal, becauſe it leads to an improper diſcuſſion, and is contrary to ſound policy. Therefore, a wager concerning the duties on hops, is illegal.

Thus, in the caſe of *Atherfold* v. *Beard*, (*p*) which was an action of *aſſumpſit* upon a wager of five guineas, whether the *Canterbury* collection of the duties upon hops for the year 1786, would amount to more than the *Canterbury* collection for the preceding

(*o*) *Trin.* 21 Geo. 3. *B. R.* 1 *Term Rep.* 57. *n. b.* (*p*) 2 *Term Rep.* 610. *See alſo* Shirley *v.* Sankey, 2 *Bos. & Pul.* 130. *and* Tappenden *v.* Randall, *Ib.* 467. *S. P. et ante*, 120.

year;

year; the plaintiff affirmed the it would, the defendant that it would not. The declaration contained ſeveral counts, but the plaintiff had a verdict on the 5th, which was in ſubſtance as above. At the trial evidence was given of the defendant's admiſſion that he had loſt the wager, on which evidence alone the verdict was given. A motion, however, was made in arreſt of judgment, on the ground that the wager was void, as being contrary to ſound policy: And of this opinion was the Court; and the judgment was accordingly arreſted.

Aſhburſt, J. ſaid: "In my opinion the courts have gone far enough in encouraging impertinent wagers. Perhaps it would have been better for the public, if the courts had originally determined, that no action to enforce the payment of wagers ſhould be permitted: as far, however, as the determinations have gone, we are bound by authority: but I think we ought not to go further. Now I am of opinion, that the preſent caſe falls within the principle of thoſe wagers which have been determined not to be good; the courts have ſaid that wagers ſhall not be allowed which tend to introduce indecent diſcuſſions, or which in the event may have an influence on the public policy of the kingdom. On this principle a wager on the event of an election of members to ſerve in parliament was held to be illegal, becauſe the perſons laying the wager were intereſted in altering the free courſe of election. The preſent wager alſo appears to me to fall under the ſame claſs of objection, becauſe it is againſt the ſound policy of the kingdom: It might be attended with miſchievous conſequences to permit any two perſons, by the means of laying an impertinent wager, to bring forward a diſcuſſion of this ſort, and expoſe to all the world the amount of the public revenue. The parliament is the proper place in which theſe queſtions are to be diſcuſſed; and it would be improper to permit it elſewhere. The plaintiff's counſel have admitted, that the officers of exciſe were not bound to produce the public books. And, indeed, it would be highly inconvenient if they were liable to be called upon by every individual for that purpoſe. Now that goes the whole length of determining this caſe; for if the wager be ſuch that the beſt evidence by which it muſt be proved is improper to be admitted, that circumſtance ſhows that the wager is in itſelf illegal; and if ſo, no admiſſion of the party that he has loſt the wager can make that legal, which is in its nature illegal. For he has a right to ſay, that though he has loſt his wager, originally it

it was illegal; and he may refuſe to pay it on that ground. Therefore I am clearly of opinion that this judgment ought to be arreſted."

Buller, J. "This is the caſe of an idle wager between two perſons who have no concern in the ſubject, to draw into queſtion a matter that reſpects the intereſt and general importance of the country: and on that ground I think that the wager is illegal. I do not find that it has ever been eſtabliſhed as a poſition of law, that a wager between two perſons, not intereſted in the ſubject matter, is legal. If it were ſo by the law of *England*, we muſt be bound by it; if not, I ſhould hold otherwiſe. Such a wager is not permitted by the laws of other countries; it is not allowed by the civil law, nor by the law of *Scotland*; and a determination on that point, which came from the court of ſeſſions in *Scotland* was affirmed here, in the Houſe of Lords, on an appeal. But, however the queſtion may be as to wagers in general, the diſtinction which has been taken in former caſes will govern this. What Lord *Mansfield* ſaid in the caſe of *Murry* v. *Kell*, * is directly applicable to this; he ſaid, that that wager was good, becauſe it was on a private event: from whence it is to be inferred, that in his opinion it would have been void had it been on a public event. The objection, in this caſe, has greater weight than that in *Foſter* v. *Thackeray*, (*q*) for there the event, on which the wager was founded, was a matter of notoriety to all the world. But this wager could not be proved without ſearching the books relating to the revenues of the country. And I am glad to find that in the only two caſes where this queſtion has ariſen at *Niſi Prius*, Lord *Mansfield* and my brother *Aſhburſt* were both of opinion that the officers were not bound to produce the revenue books. If it were neceſſary to have recourſe to it, I incline to think, with the opinion of this Court, and that of the *Common Pleas*, that the ſtatute of 14 *Geo.* 3. would reach the preſent caſe. For though the ſtatute ſpeaks only of policies, yet I think it may extend to caſes like the preſent. For either the courts muſt reſtrain that Act of Parliament to ſuch caſes as in form are policies, which would intirely repeal the ſtatute; or by purſuing the ſpirit of the act, extend it to all caſes. I think the latter is the true conſtruction; for a policy is nothing but a promiſe. And it would be ſtrange to determine that the party might do

* *Cited in* 2 *Term Rep.* 611. (*q*) *Ante*, 493.

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the ſame thing in one form, which the ſtatute has expreſsly prohibited to be done in another."

4. *Of Wagers concerning an Election.*

A wager between two voters, with regard to the event of an election of a member to ſerve in parliament, is illegal, though laid before the poll commences.

Thus, in the caſe of *Allen* v. *Hearn*, (*r*) which was an action of *aſſumpſit* to recover 100*l.*, on a wager made between the plaintiff and defendant on the event of an election of a member to ſerve in parliament for the borough of *Southwark*. On the trial a verdict was found for the plaintiff, ſubject to the opinion of the Court upon the following caſe:

"That the borough of *Southwark* ſends two members to parliament; and that on the 22d of *June*, 1784, there was a vacancy in the room of Sir *Barnard Turner*. That Mr. *Le Meſurier* and Sir *Richard Hotham* were candidates for the ſaid borough. That the plaintiff and the defendant were voters and partizans of the reſpective candidates, and had canvaſſed and taken decided parts on oppoſite ſides; the plaintiff being for Mr. *Le Meſurier*, and the defendant ſiding with Sir *Richard Hotham* before the bet was made. That the bet was made before the poll began, and both parties voted for their reſpective friends, and ſolicited other voters. That Mr. *Le Meſurier* was duly elected and returned as member of the ſaid borough at the ſaid election." The queſtion was, whether the plaintiff was entitled to recover in this action?

The Court were of opinoin, that the wager was illegal; and conſequently that the plaintiff was not entitled to recover the money won of the defendant.

Lord *Manſfield*, Ch. J. ſaid: "Whether this particular wager had any other motive than the ſpirit of gaming, and the zeal of both parties, I do not know: but this queſtion turns on the ſpecies and nature of the contract; and if that be in the eye of the law corrupt, and againſt the fundamental principles of the conſtitution, it cannot be ſupported by any court of juſtice. One of the principal foundations of this conſtitution depends on the proper

(*r*) 1 *Term Rep.* 56.

exercise of this franchise, that the election of members of parliament should be free, and particularly that every voter should be free from pecuniary influence in giving his vote. This is a wager in the form of it, by two voters, and the event is, the success of the respective candidates. The success therefore of either candidate is material; and from the moment the wager is laid both parties are fettered. It is therefore laying them under a pecuniary influence; it is making each of them in the nature of a candidate. If this be allowed, every other wager may be allowed. But this is not all. A gaming contract should not be encouraged if it has a dangerous tendency. What is so easy, as in a case where a bribe is intended, to lay a wager? It is difficult to prove that the wager makes him give a contrary vote to what he would otherwise have done: but still it is a colour for bribery. It has an influence on his mind. Therefore in the case in *Cowper*, (*s*) if the wager had been laid with a Lord of Parliament, or a Judge, it would have been void from its tendency, without considering whether a bribe were really intended or not. This is of that nature, and therefore void."

5. *Of Wagers Concerning Judicial Determinations.*

A wager as to the event of a judicial determination is legal, and an action will lie to recover the money won upon it.

Thus, in the case of *Jones* v. *Randall* and another, (*t*) which was an action of *assumpsit* upon a wager, "whether a decree of the "court of *Chancery* would be reversed on appeal to the *House of* "*Lords*." The decree was reversed; whereupon the plaintiff brought this action, and obtained a verdict for fifty guineas, the amount of the wager laid. But a motion was made in arrest of judgment upon two grounds, first, because the event was not contingent but certain; and secondly, that the contract was illegal, being *contra bonos mores*.

The court determined that the wager was contingent and legal. And Lord *Mansfield*, Ch. J. said: "This case must be decided upon the state of it as it appears upon the declaration. It is there stated to be a wager made by the defendant, who was the party appealing in a cause depending before the House of Lords;

(*s*) *The following case.* (*t*) *Cowp.* 37.

and who, in caſe the judgment was reverſed in his favour, was to pay 50*l.* to the plaintiff; if it was affirmed he was to receive 50*l.* He was willing therefore to receive ſomething if he loſt by the deciſion, and to pay the ſame ſum if the judgment were in his favour. The chances therefore were equal. The queſtion upon this ſtate of it is, whether this contract is againſt law, and void upon the face of it? It is admitted by the counſel, that the contract is againſt no poſitive law: it is admitted too that there is no caſe to be found which ſays it is illegal: but it is argued, and rightly, that notwithſtanding it is not prohibited by any poſitive law, nor adjudged illegal by any precedents, yet it may be decided to be ſo upon principles; and the law of *England* would be a ſtrange ſcience, indeed, if it were decided upon precedents only. Precedents ſerve to illuſtrate principles, and to give them a fixed certainty. But the law of *England*, which is excluſive of poſitive law, enacted by ſtatute, depends upon principles; and theſe principles run through all the caſes according as the particular circumſtances of each have been found to fall within the one or other of them. The queſtion then is, whether this wager is againſt principles? If it be contrary to any, it muſt be contrary either to principles of morality, for the law of *England* prohibits every thing which is *contra bonos mores*; or it muſt be againſt principles of *ſound policy*; for many contracts which are not againſt morality, are ſtill void, as being againſt the maxims of ſound policy. With reſpect to the firſt queſtion, whether it is againſt morality? This contract is equal between the parties, they have each of them equal knowledge or equal ignorance: and it is concerning an event which, reaſoning by the rules of predeſtination, is to be ſure, ſo far certain, that it muſt be as it ſhould afterwards happen to be. But it is a future event equally uncertain to the parties, whether the Houſe of Lords would be of the ſame or of a different opinion with the Chancellor; the preſumption, if any, is rather againſt the perſon betting in oppoſition to the Chancellor's judgment.

No doubt there may be a wager of this kind under ſuch circumſtances as would render it immediately immoral, and change it into a crime, and of theſe there are ſome in the books; as in evaſions of ſimony, where a perſon who wanted to be made a biſhop, converſing with the perſon who had moſt intereſt at court upon the ſubject of a ſee, that was then vacant, ſaid, 'I will 'bet you ſo much, naming a conſiderable ſum, that I have not 'the

'the biſhoprick.' This was a mere colour to disguiſe what was the real intention of the party, which was to purchaſe it. The contract in that caſe is clearly and manifeſtly corrupt, and therefore void. So, if the preſent wager had been made with one of the *judges*, or one of the *lords*, it would have been a bribe. Or if it had been, as Mr. *Dunning* ſtated it, merely a colour to cover uſury, then, notwithſtanding the diſguiſe of the wager, the moment the truth appeared, it would remain to be governed by principles, as if the parties had really entered into ſuch a corrupt agreement. Again, if it had been a wager laid with either the attorney or counſel in the cauſe, it would have been an objection: but there is no fact of that ſort in this caſe, which is a tranſaction, that, as far as I can ſee, contains nothing either immoral or contrary to juſtice. As to the certainty of the law mentioned by Mr. *Dunning*, it would be very hard upon the profeſſion if the law was ſo certain that every body knew it. The misfortune is, that it is ſo uncertain that it coſts much money to know what it is, even in the laſt reſort.

The ſecond queſtion is, whether this contract is againſt ſound policy? And ſuppoſing it clear of all the circumſtances beforementioned, ſuch as its being upon equal terms, without fraud, and with a view only of ſecuring ſomething to the appellant, in caſe the deciſion went againſt him, I profeſs that, even independent of thoſe circumſtances, I ſee no objection to it in ſound policy. From my own memory of this cauſe, if there ever was uncertainty in any caſe, it was in this. When a nice queſtion therefore is depending, it may be a point upon which even perſons in the profeſſion may differ; and if either they or any two other perſons bet about the deciſion, provided there be no fraud or colour in the caſe, I ſee no reaſon why they ſhould not do ſo. The preſent caſe being of that ſort, and not being prohibited by any poſitive law, nor contrary to any principle of ſound policy or morality, I do not think we are at liberty to prevent the plaintiff from bringing his action to recover the money he has won; and therefore I am of opinion, that the rule for arreſting the judgment ought to be diſcharged.

6. *Of Wagers Concerning Horſe Races.*

To entitle a party to recover money won upon a wager on the event of a horſe-race, it muſt be ſuch a race, and for ſuch a ſum, and between ſuch parties, as are deſcribed in the ſtatute 13 *Geo.* 2. *c.* 19. *ſ.* 1., by which it is enacted, "That no perſon or perſons whatſoever ſhall enter, ſtart, or run any horſe, mare or gelding, for any plate, prize, ſum of money, or other thing, unleſs ſuch horſe, mare or gelding ſhall be truly and *bonâ fide* the property of and belonging to ſuch perſon ſo entering, ſtarting, or running the ſame horſe, mare or gelding; nor ſhall any one perſon enter and ſtart more than one horſe, mare or gelding, for one and the ſame plate, prize, or ſum of money or other thing: and in caſe any perſon or perſons ſhall, after the 24th day of *June*, 1740, enter, ſtart, or run any horſe, mare or gelding, not being the property, truly and *bonâ fide*, of ſuch perſon ſo entering, ſtarting, or running the ſame for any plate, prize, ſum of money, or other thing, the ſaid horſe, mare or gelding, or the value thereof, ſhall be forfeited, to be ſued for and recovered, and diſpoſed of in manner as is therein-after mentioned. And in caſe any perſon or perſons ſhall enter or ſtart more than one horſe, mare or gelding, for one and the ſame plate, prize, or ſum of money, or other thing, every ſuch horſe, mare or gelding, (other than the firſt entered horſe, mare or gelding,) or the value thereof, ſhall be forfeited."

And by the ſecond ſection it is enacted, "That no plate, prize, ſum of money, or other thing, ſhall be run for by any horſe, mare or gelding, or advertized, publiſhed, or proclaimed to be run for by any horſe, mare or gelding, unleſs ſuch plate, prize, or ſum of money, or other thing, ſhall be of the full, real or intrinſic value of 50*l.* or upwards; and in caſe any perſon or perſons ſhall, from and after the 24th day of *June*, 1740, enter, ſtart, or run any horſe, mare or gelding, for any plate, prize, ſum of money, or other thing, of leſs value than 50*l.*, or ſhall make, print, advertiſe, publiſh, or proclaim any advertiſement, or notice of any plate, prize, ſum of money, or other thing, of leſs value than 50*l.* as aforeſaid, to be run for by any horſe, mare or gelding, every ſuch perſon ſo entering, ſtarting or running ſuch horſe, mare or gelding, for ſuch plate, prize, ſum of money, or other thing, of leſs value than 50*l.* as aforeſaid, ſhall forfeit and

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loſe the ſum of 200*l.*" This ſection alſo inflicts the penalty of 100*l.* on any perſon who advertiſes a ſmaller prize than 50*l.*

By ſection 3. it is declared, "that horſes of five years old ſhall carry ten ſtone weight; ſix years old, eleven ſtone; and ſeven years old, twelve ſtone, on pain of 200*l.*" But this is repealed by 18 *Geo* 2. *c.* 34. *ſ.* 11.; and now horſes of any age may carry any weight, at the option of the parties: for it was judged that the high prices given for the horſes of ſize and ſtrength, was ſufficient encouragement to breeders, without laying this reſtriction on the owners of running horſes.

By ſection 4. the race muſt begin and end the ſame day; and by ſection 5. no match ſhall be for leſs than 50*l.* unleſs run at *Newmarket*, or at *Blackhambleton*, in *Yorkſhire*, under the penalty of 200*l.*: and by ſection 7. all the entrance-money ſhall be paid to the ſecond-beſt horſe which ſhall run for the plate or prize.

By ſection 8. it is provided, that that act ſhall not extend to prevent horſes running for a plate or prize, iſſuing out of lands or money appropriated for that purpoſe.

Upon this act of parliament it has been determined, that a match for 25*l.* a ſide is a match for 50*l.* within the meaning of the act.

Thus, in the caſe of *Bidmead* v. *Gale*, (*u*) which was an action of *covenant*, brought upon articles to run a horſe race. The agreement was, that each ſhould ſtart his mare; and that if either ſhould refuſe or neglect, he ſhould forfeit and pay 25*l.* to the other: ſo that it was a match for 25*l.* each ſide, play or pay. But the plaintiff was to pay the defendant 5*l.* beforehand, as a conſideration, to induce him to make the match. The defendant afterwards refuſed to run the match; whereupon the plaintiff brought this action againſt him for the 25*l.* and aſſigned the breach of covenant in the defendant's not ſtarting his mare.

The queſtion was, whether this was a match for 50*l.* within the 5th ſection of the beforementioned ſtatute?

The defendant's counſel endeavoured to ſhow that this was only a match for 25*l.*, as neither party could loſe more than that ſum; or, at the utmoſt, a match for 45*l.*, as the total of both ſums riſked amounted to no more; for there was no riſk remaining upon the 5*l.* which the defendant had received from the

(*u*) 4 *Bur.* 2432. 1 *Bl. Rep.* 671. *S. C.*

plaintiff, and had ſafe in his pocket, without poſſibility of loſing it upon this match.

The plaintiff's counſel argued, that the ſum run for was moſt manifeſtly 50*l.*; and that the advancing 5*l.* certain made no ſort of difference: the plaintiff only gave the defendant 5*l.* to run a match with him for 50*l.*

Lord *Mansfield*, after the Court had taken time to conſider the queſtion, declared, that they were all of opinion that this was not a match for *leſs* than 50*l.* Judgment was therefore given for the plaintiff.

The ſtatute 13 *Geo.* 3. is excluſively applicable to races run by horſes *bonâ fide* the property of the perſon who makes the ſtake or prize run for.

Thus, in the caſe of *Ximenes* v. *Jacques*, (*v*) which was an action of *aſſumpſit* on a wager of one hundred guineas, "That the plaintiff would perform a journey of two hundred and forty miles in a poſt-chaiſe and a pair of horſes, in twenty-four hours, being allowed to change poſt-chaiſes and horſes as often as he pleaſed; but the expences were not to exceed the uſual ſum paid per mile for a poſt-chaiſe and pair, on the poſt roads. After a verdict for the plaintiff, it was moved, in arreſt of judgment, that this was an illegal wager, being a horſe race againſt time, and void by the ſtatutes 16 *Car.* 2. *c.* 7. and the 9 *Ann. c.* 14. The Court were of this opinion, and the judgment was arreſted; and the ground of their opinion is ſaid * to have been, that the act of 13 *Geo.* 2. extended only to *bonâ fide* horſe-racing.

So, a wager of above 50*l.* that a ſingle horſe ſhall run, on the high-road, from *A.* to *B.* and arrive ſooner than one of two other horſes, is void; ſuch a race not being within the ſtatute 13 *Geo.* 2. *c.* 19.

Thus, in the caſe of *Whaley* v. *Pajot*, (*w*) which was alſo an action of *aſſumpſit* upon the following wager: "Mr. *Pajot* bets Mr. *William Whaley* five hundred guineas and a dinner, (to be had at *Sittingbourne*, in *Kent*,) that his, Mr. *Pajot*'s brown horſe,

(*v*) 6 *Term Rep.* 499. * *Per Lord* Eldon, *Ch. J. poſt*, 504.
(*w*) 2 *Bos. and Pul.* 51. *But ſee Robſon* v. *Hall*, *Peake's Cas. N. P.* 127.

called

called *Little Devil*, goes from *London* to the ſaid town, in the ſaid county of *Kent*, (rode alſo by himſelf,) ſooner than Mr. *William Whaley*'s two hacks, one a brown, called *Billy*, the other a dark bay, called *Allſteel*, go the ſame diſtance. The two horſes of Mr. *Whaley* to be placed at any diſtance from each other that he, Mr. *Whaley*, may think proper; but to be obliged one of them to arrive in the town of *Sittingbourne* ſooner than Mr. *Pajot*'s horſe. Mr. *W. Whalley* has the power of naming his rider. The meaning of this bet is, that Mr. *Pajot* bets Mr. *W. Whaley*, that his, Mr. *Pajot*'s horſe, can go the diſtance abovementioned in a ſhorter time than than Mr. *W. Whaley*'s horſes abovementioned, placing one of them at a certain diſtance from the place from whence the other ſtarts."

The queſtion was, whether this was a match or race within the meaning of the 13th and 18th *Geo.* 2.?

This caſe was twice argued. Upon the firſt argument, Lord *Eldon*, Ch. J. ſaid, "It is the more material that this queſtion ſhould be again diſcuſſed, becauſe it does not appear, from the report of *Ximenes* v. *Jacques*, (*x*) to have been there conſidered; and yet a race with a poſt-chaiſe and pair is hardly to be deemed leſs a race, in the popular ſenſe of the word, than ſuch a race as the preſent one, on the high road from *London* to *Sittingbourne*. The 16 *Car.* 2. *c.* 7., in the ſecond ſection, prohibited various ſpecies of gaming, horſe-racing, &c. under certain penalties. After this, the 9 *Ann. c.* 14. alſo prohibited various ſpecies of gaming, under heavier penalties; and though horſe-racing was not named in that ſtatute, yet it has been holden to come within the ſpirit of it. The 16 *Car.* 2. does not in terms avoid any contract; but the tranſaction on which the contract is founded being prohibited, the contract itſelf cannot be ſupported. The 9 *Anne* expreſsly avoids the contract. Theſe ſtatutes were followed by the 13 *Geo.* 2. *c.* 19. and 18 *Geo.* 2. *c.* 34. Had many contracts founded in horſe-racing been held illegal, previous to theſe ſtatutes, it might be found difficult to maintain that ſuch horſe-racing could now be deemed legal, which before had been deemed illegal. But the 13 *Geo.* 2. having prohibited many ſpecies of horſe-racing, the law ſeems to have implied that ſuch ſpecies of horſe-racing as were not prohibited by that ſtatute, by not being

(*x*) *Ante*, 502.

prohibited became legal. And the 18 *Geo.* 2. having taken away ſome of the prohibitions and penalties of the 13 *Geo.* 2. the ſame kind of reaſoning ſeems to have been applied, namely, that theſe ſpecies of racing, with reſpect to which certain reſtrictions were taken away, were thereby altogether legalized. There ſeems to be much ground for arguing, from the nature of the 16 *Car.* 2. and 9 *Anne*, that theſe acts ought to be conſtrued ſtrictly, in order to enforce the principle on which they are founded, namely, to prohibit all horſe-racing; and that the 13 and 18 *Geo.* 2. are, from their nature, to be ſo conſtrued as to encourage the breed of horſes, and to permit that ſpecies of horſe racing only, called racing on the turf. It is to be obſerved, that the 13 *Geo.* 2. ſpeaks of entering, placing, ſtarting, &c., and that the expreſſion "any "place or places whatſoever," uſed in 18 *Geo.* 2. can hardly mean "all *England*."

After the caſe had been argued a ſecond time, Lord *Eldon*, Ch. J. ſaid, "Upon inquiry of the judges of the court of *King's Bench*, we find that the judgment of that court in *Ximenes* v. *Jacques* proceeded on an opinion that the 13 and 18 *Geo.* 2. relate to *bonâ fide* horſe racing only. Without, therefore, again entering into the grounds before ſtated, it is ſufficient for me to declare it to be the opinion of the Court, that the tranſaction deſcribed in this caſe is not that ſpecies of horſe race, or match, which is legalized by the 13 and 18 *Geo.* 2., and conſequently that this action cannot be maintained."

Horſe racing being a ſpecies of gaming, are of courſe within the ſtatutes (*y*) againſt gaming; (*z*) and therefore a wager or bet upon a horſe race is void by thoſe ſtatutes, if made by perſons who are not owners of the horſes intended to be run.

Thus, in the caſe of *Goodburn* v. *Marley*, (*a*) which was an action brought for 15*l.* won as a wager, at a horſe race. And, upon a caſe made and argued, it was determined, that the action would not lie: for 16 *Car.* 2. *c.* 7. has theſe words, horſe racing, and a great many other words, which are not particularly in 9 *Anne*, *c.* 14. but are within the general words, other game or games.

(*y*) 16 *Car.* 2. *c* 7. 9 *Anne*, *c.* 14.
(*z*) 1 *Lord Raym.* 89. *n.* 3 *Salk* 175.
(*a*) *Stra.* 1159. *In a note to the third edition of theſe Reports, it is ſtated, that the wager was, "that the mare of one B. beat the defendant's mare."*

So,

So, in the caſe of *Blackſtone* v. *Pye*, (*b*) which was an action of *aſſumpſit* upon a wager of fourteen guineas to eight guineas, by the plaintiff with the defendant, upon two races, to be run by two horſes, called *Elephant* and *Granby*, that *Elephant* would win one of the races; viz. that if *Elephant* won one of the races, defendant promiſed to pay plaintiff eight guineas; and, in conſideration thereof, if *Elephant* won neither of the races, plaintiff promiſed to pay defendant eight guineas. The event was, that *Elephant* won one race, ſo the defendant loſt the wager. After verdict it was moved, in arreſt of judgment, that the conſideration of laying fourteen guineas to eight guineas, in this caſe, was *nudum pactum*; becauſe the laying above 10*l.* upon a horſe-race is a bet within the ſtatutes againſt gaming, if the ſtatute of 16 *Car.* 2. *c.* 7. and the ſtatute 9 *Anne*, *c.* 14. be taken together; ſo that plaintiff could not poſſibly loſe the fourteen guineas, and therefore ought not to be allowed to win the eight guineas of the defendant: and of that opinion was the whole Court; and the judgment in this caſe was arreſted; and the Court ſaid, "they ought to extend the ſtatute of 9 *Anne*, to prevent exceſſive betting upon all ſports, as well as games; and that although horſe-racing is not mentioned in that ſtatute, yet it is within the general words, other game or games, as in the caſe of *Goodburn* v. *Marley*.

So, a betting to any amount above 10*l.* is void, though the ſum won be under that amount.

Thus, in the caſe of *Clayton* v. *Jennings*, (*c*) which was alſo an action of *aſſumpſit* for five guineas won, by betting at a horſe-race. The bet was ten guineas by plaintiff to five guineas by the defendant.

Upon a motion in arreſt of judgment, the Court held, that, as the ten guineas could not have been recovered, by reaſon of the ſtatute 9 *Ann.* *c.* 14. there was no mutuality in the wager; and *Aſton*, J. mentioned a caſe of *Connor* and *Quick*, in the *King's Bench*, where the Court took a diſtinction between running a horſe for 50*l.*, which was lawful, and betting on the ſide of the horſe, which was not ſo.

So, where the race is in itſelf illegal, any bet upon the event of it, though under the ſum of 10*l.* is illegal alſo.

(*b*) 2 *Wils.* 309. (*c*) 2 *Bl. Rep.* 706.

Thus,

Thus, in the caſe of *Johnſon* v. *Bann*, (*d*) which was an action brought to recover a wager of 5*l.* on the event of a horſe race. But upon the trial, it appearing that the bet had been made on a horſe race for a ſmaller ſum than 50*l.*, the plaintiff was nonſuited: and on a motion to ſet aſide the nonſuit, the Court ſaid, "It is ſufficient, without adverting to caſes, to ſay that the horſe race itſelf is prohibited by the ſtatute 13 *Geo.* 2. *c.* 19.; and as the race, which is the ſubject of the wager, is illegal, ſo alſo is the wager."

7. *Of Wagers Concerning Foot Races.*

A foot race is a game within the ſtatute 9 *Ann. c.* 14.

Thus, in the caſe of *Brown* v. *Berkeley*, (*e*) which was an action of *covenant*, upon certain articles of agreement, for the ſum of 20*l.* laid between the plaintiff and defendant, that the defendant did not, within one month from the date of the agreement, find a man who ſhould carry on foot twenty-four ſtone weight ten miles within fifteen hours time.

The Court determined, that this was a wager within the ſtatute 9 *Anne c.* 14. and therefore void.

8. *Of Wagers Concerning Games of Play; and of Money won at Play.*

A wager upon the rules of a game not prohibited by law, is valid.

Thus, in the caſe of *Pope* v. *St. Leger*, (*f*) where it appeared, that at the game of *backgammon*, one of the players ſtirred one of his men, but did not move it from the point; and the queſtion was, whether he was bound to play it? On this a wager of 100*l.* was laid, and the determination referred to the groom porter: and now, in an action, the queſtion was on the ſtatute againſt gaming, whether this was within the ſtatute? And it was held, this wager was not prohibited by the ſtatute; for it was not on the chance of the play, but on the right of the play, which is a collateral matter.

(*d*) 4 *Term Rep.* 1.
(*e*) *Cowp.* 281. *See alſo* Lynall v. Longbothom, 2 *Wils.* 36. *S. P.*
(*f*) 1 *Salk.* 344.

But

But no action will lie on a wager respecting the mode of playing an illegal game: and if such a cause be set down for trial, the judge at *nisi prius* will order it to be struck out of the paper. (*g*)

Money fairly won at play, if under 10*l.* is recoverable in an action of *assumpsit*.

Thus, in the case of *Bulling* v. *Frost*, (*h*) which was an action of *assumpsit* to recover 3*l.* 10*s.* for money won at play.

It appeared in evidence, that the plaintiff and the defendant played at cards, at the game of all-fours; and that the plaintiff won from the defendant the sum stated in the declaration. The play appeared to be fair; and the sums won and lost at the sitting never amounted to 10*l.*

Lord *Kenyon*, Ch. J. said, he had never before known an action of this sort brought, but as the play was fair, and under 10*l.*; that, under the stat. 9 *Ann. c.* 14. such an action might be maintained; and therefore directed the jury, if they believed the plaintiff's witnesses, to find a verdict for him; which they did.

(*g*) Brown v. Leeson, 2 *H. Bl.* 43. (*h*) 1 *Esp. Rep.* 235.

For more concerning Wagers, vide *ante*, tit. *Money Had and Received upon Illegal Wagers*, p. 120; and *Money Lent and Advanced*, p. 143,4.

CHAPTER

CHAPTER XIX.

Of Bonds made in Scotland not under Seal.

THE aſſignee of a *Scotch* bond may maintain an action of *aſſumpſit* in *England* againſt the obligor in his own name; ſuch an inſtrument being aſſignable by the laws of *Scotland*.

Thus, in the caſe of *Innes* v. Sir *T. Wallace Dunlop*, Baronet, (*a*) which was an action of *aſſumpſit*. The firſt count of the declaration ſtated, that on the 24th of *September*, 1776, the defendant, together with *T. Wallace* and *J. Boſwell*, made their joint and ſeveral bond, in *Scotland*, for 500*l.*, and lawful intereſt to *Hunter* and Co., payable at *Whitſunday* then next, together with 100*l.* as a liquidated penalty in default of payment on that day; that default was made in payment on that day; that on the 22d of *May*, 1779, *Hunter* and Co., according to the laws of *Scotland*, aſſigned the ſaid inſtrument to *John Hunter*, who in *May*, 1787, aſſigned it to *J. Robertſon*, who in *November*, 1793, aſſigned it to the plaintiff, of which the defendant had notice; that by reaſon of the premiſes, and according to the law of *Scotland*, the defendant became and was indebted to the plaintiff in the ſaid ſum of 500*l.*, and alſo in 100*l.* for the liquidated penalty; and being ſo indebted, he, in conſideration thereof, promiſed to pay, &c. In the ſecond count it was ſtated, that on the 1ſt of *May*, 1779, the defendant was indebted to *Hunter* and Co. in 1400*l.*, for money lent and advanced by them to the defendant in *Scotland*, and that afterwards *Hunter* and Co., in due manner, according to the laws of *Scotland*, aſſigned over the ſaid debt to the plaintiff; that by reaſon of the premiſes, and according to the laws of *Scotland*, the defendant became liable to pay the ſaid ſum to the plaintiff, and being ſo liable, he, in conſideration thereof, promiſed to pay, &c. There were four other counts for money paid

(*a*) 8 *Term Rep.* 595.

by

by the plaintiff to the uſe of the defendant; for money had and received by the defendant to the plaintiff's uſe; for money lent and advanced by the plaintiff to the defendant; and on an account ſtated. The defendant pleaded the general iſſue to the four laſt counts, and demurred to the two firſt.

In ſupport of the demurrer it was objected, that the plaintiff, who was merely the aſſignee of a *choſe* in action, could not ſue in his own name, but ſhould have brought the action in the name of *Hunter* and Co., the obligees in the bond. But the Court, after obſerving that this was not an action on the bond, ſaid that they were clearly of opinion, that the aſſignment of the bond to the plaintiff was a conſideration for the *aſſumpſit* by the defendant, in the ſame manner as actions of *aſſumpſit* are maintained in every day's practice upon foreign judgments; and that the defendant, by demurring, had confeſſed both the conſideration and the *aſſumpſit*. And therefore they gave judgment for the plaintiff.

CHAPTER

CHAPTER XX.

Of Contracts for Uſe and Occupation of Houſes, &c.

AT common law it was holden that an action of *aſſumpſit* would lie for rent on an *expreſs*, but not upon an *implied* promiſe; and in the inſtance of an expreſs promiſe, it muſt have been made at the time of the demiſe. (*a*)

But now, by ſtat. 11 *Geo.* 2. *c.* 19. *ſ.* 14. it is declared, that to obviate ſome difficulties that many times occur in the recovery of rents, where the demiſes are not by deed, be it enacted, "that from and after the 24th day of *June* 1738, it ſhall and may be lawful to and for the landlord or landlords, where the agreement is not by deed, to recover a reaſonable ſatisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant or defendants, in an action on the caſe, for the uſe and occupation of what was ſo held or enjoyed; and if in evidence on the trial of ſuch action, any *parole* demiſe or any agreement (not being by deed), whereon a certain rent was reſerved ſhall appear, the plaintiff in ſuch action ſhall not therefore be nonſuited, but may make uſe thereof as an evidence of the *quantum* of the damages to be recovered."

"And by ſection 15, after recititing, "whereas where any leſſor or landlord, having only an eſtate for life in the lands, tenements or hereditaments demiſed happen to die before, or on the day, on which any rent is reſerved or made payable, ſuch rent or any part thereof, is not by law recoverable by the executors or adminiſtrators of ſuch leſſor or landlord; nor is the perſon in reverſion intitled thereto any other than for the uſe and occupation of ſuch lands, tenements or hereditaments, from the death of the tenant for life; of which advantage hath been often taken by the

(*a*) *See Danv. Abr. tit. actions* (O). *Com. Dig. tit. action upon aſſumpſit*, (C.) *Bac. Abr. tit. Rent*, (K. 6.) *Bul. N. P.* 138.

under

under tenants, who thereby avoid paying any thing for the ſame. "For remedy whereof it is enacted, that from and after the twenty-fourth day of June, One thouſand ſeven hundred and thirty eight, where any tenant for life ſhall happen to die before, or on the day, on which any rent was reſerved or made payable upon any demiſe or leaſe of any lands, tenements, or hereditaments which determined on the death of ſuch tenant for life, that the executors or adminiſtrators of ſuch tenant for life ſhall and may, in an action on the caſe, recover of and from ſuch under tenant or under tenants of ſuch lands, tenements, or hereditaments, if ſuch tenant for life die on the day on which the ſame was made payable, the whole; or if before ſuch day then a proportion of ſuch rent according to the time ſuch tenant for life lived, of the laſt year, or quarter of a year, or other time in which the ſaid rent was growing due as aforeſaid, making all juſt allowances or a proportionable part thereof reſpectively."

And by ſec. 18, it is enacted "that in caſe any tenant or tenants ſhall give notice of his, her, or their intention to quit the premiſes by him, her, or them, holden at a time mentioned in ſuch notice, and ſhall not accordingly deliver up the poſſeſſion thereof at the time in ſuch notice contained, that then the ſaid tenant or tenants, his, her, or their executors or adminiſtrators, ſhall from thence forward pay to the landlord or landlords, leſſor or leſſors, double the rent or ſum, which he, ſhe, or they ſhould otherwiſe have paid, to be levied, ſued for, and recovered at the ſame times, and in the ſame manner, as the ſingle rent or ſum before the giving ſuch notice could be levied, ſued for, or recovered; and ſuch double rent or ſum ſhall continue to be paid, during all the time ſuch tenant or tenants ſhall continue in poſſeſſion as aforeſaid."

Upon this ſtatute a landlord may declare by action of *indebitatus aſſumpſit* for rent in arrear, in all caſes except where there is a deed, under ſeal, containing a covenant to pay the rent, in which caſe the action muſt be either *covenant* or *debt*. And the action of *indebitatus aſſumpſit* for uſe and occupation being founded on a contract either expreſſed or implied, it is a general rule, that wherever a tenant uſes or enjoys premiſes by permiſſion of the owner, he ſhall be liable to be ſued in this form of action upon a *quantum meruit*. If therefore a landlord conveys his title and intereſt of houſes or lands in the occupation of a tenant, either by way of purchaſe, mortgage, or grant of an annuity, the tenant is liable to be ſued in this form of action, at the ſuit of the purchaſer, mort-

gagee, or grantee, for rent in arrear during their time, even after a recovery by them in ejectment, for ſo much as was in arrear previous to the day of the demiſe laid in the declaration in ejectment.

Thus, in the caſe of *Birch* v. *Wright*, (*b*) which was an action of *indebitatus aſſumpſit* for uſe and occupation. At the trial a verdict was found for the plaintiff, ſubject to the opinion of the court of *King's Bench*, on a caſe which ſtated in ſubſtance as follows: "That the defendant before the 18th of *July*, 1777, was tenant from year to year of the lands in queſtion to Mr. *Bowes*, at the yearly rent of 223*l.* 10*s.*, payable half yearly, viz. on the 12th of *May*, and the 22d of *November*. That by indenture of the 18th of *July* 1777, Mr. *Bowes* and his wife Lady *Strathmore* granted annuities to ſeveral perſons therein named for the life of Lady *Strathmore*; and they covenanted to levy a fine to the uſe of the plaintiff and Mr. *Gooſtrey* (who is ſince dead) upon truſt to receive the rents and pay the annuities out of them, and then to pay the reſidue to Mr. *Bowes* and Lady *Strathmore*. That a fine was levied accordingly. That the defendant paid all the rent which was due on the 22d of *November* 1784, except 81*l.* 15*s.* to Mr. *Bowes*, which ſum of 81*l.* 15*s.* is ſtill unpaid; and no rent has been paid by the defendant ſince that time. That in *May* 1785 the plaintiff and *Gooſtrey* brought an ejectment againſt the defendant and laid the demiſe on the 6th of *April* 1785. That in *Trinity* term 1785, they obtained judgment, and in *September* 1785 gave notice to the defendant of their title, and required him to attorn to them, and to pay to them the money already in his hands: but the defendant refuſed to attorn; and thereupon a writ of poſſeſſion was executed, and the defendant quitted the premiſes mentioned in the declaration: that Lady *Strathmore* was then living.

The queſtion for the opinion of the Court was whether the plaintiff was entitled to recover any and what ſum of money in this action.

The Court were of opinion, that the plaintiff was entitled to recover in this action all the rent due from the defendant, and which were in his hands at the time of the notice from the plaintiff, and down to the day of the demiſe in the declaration in ejectment, but not afterwards.

(*b*) 1 *Term Rep.* 378.

Aſhburſt,

Aſhhurſt, J. ſaid: "It is very material to diſtinguiſh the different dates, and times. From the 6th of *April* 1785 to the time of recovering in the action of ejectment, in my opinion, the plaintiff is precluded from recovering in this form of action; for that would be blowing both hot and cold at the ſame time, by treating the poſſeſſion of the defendant as that of a treſpaſſer, and that of a lawful tenant, during the ſame period. The plaintiff cannot firſt recover in ejectment, and then for uſe and occupation for the time ſubſequent to the day of the demiſe in ſuch ejectment. But as for the rent due antecedent to the time of the demiſe, there is no doubt but this action is maintainable. For the ſtatute of the 4th *Ann* having rendered attornment unneceſſary, and having put the party in the ſame ſituation by the conveyance, as if the tenant had attorned, he is to be conſidered in poſſeſſion; and then, as there is no deed between theſe parties, he may maintain this action for uſe and occupation. *Moſs* v. *Gallimore*, (*c*) is expreſsly in point, and ſtronger than the preſent caſe. So that the plaintiff may recover all the rent due at the time of notice given which remained in his hands, and muſt be conſidered as landlord from ſuch term, provided the tenant be not prejudiced by the payment of any rent before notice. The queſtion then is, whether bringing an ejectment is a bar to an action, for uſe and occupation, for rent due before the time of the demiſe? In my opinion it is not for the actions are not inconſiſtent. The landlord admits him to be tenant till the 6th of *April* 1785, and conſequently is entitled to rent before that period; and after that he conſiders him a treſpaſſer."

So, if *A.* agrees to let lands to *B.* who permits *C.* to occupy them, *A.* may recover the rent in an action of *indebitatus aſſumpſit* againſt *B.* for uſe and occupation.

Thus, in the caſe of *Bull* v. *Sibbs*, (*d*) which was an action of *aſſumpſit* for uſe and occupation of lands. It appeared on the trial, that the defendant had not in fact occupied the land himſelf, but there was evidence to go to the jury from which they might infer that there had been an agreement between the plaintiff and the defendant, by which the latter was to take the land in queſtion. It alſo appeared that the defendant wiſhed to receive rent for it of one *Ditchell*, who had been in the actual poſſeſſion, though he (the defendant) had not in fact received any ſuch rent. On the

(*c*) *Doug.* 265. (*d*) 8 *Term Rep.* 327.

part of the defendant it was objected that the preſent action was miſconceived; that the action, if brought at all againſt the defendant, ſhould have been brought on the agreement; and that the defendant was not liable under the ſtatute of 11 *Geo.* 2. *c.* 19. which gives a plaintiff a right to recover a reaſonable ſatisfaction for the lands, &c. held or occupied by the defendant in an action on the caſe for uſe and occupation, &c. the defendant never having in fact held or occupied the lands in queſtion. A verdict however was found for the plaintiff for 180*l.*, nine year's rent at 20*l.* *per annum*, the jury being of opinion on the evidence given, that there had been ſuch an agreement between plaintiff and the defendant as is before ſtated, and that *Ditchell* had occupied as tenant to the defendant. And, upon a motion to ſet aſide this verdict, the Court ſaid, "that if *Ditchell* occupied the land under the defendant, the latter was anſwerable to the plaintiff in this form of action. That an occupation by the tenant of the defendant was, as far as reſpected the plaintiff, an occupation by the defendant himſelf. That it need not be ſtated in the declaration that *Ditchell* held and occupied at the inſtance and requeſt of the defendant, it being ſufficient to declare on the legal operation of an agreement. That where goods ſold, are by order of the vendee delivered to a third perſon, an action may be maintained on the common count as for goods ſold and delivered to the vendee himſelf, though in practice, it is generally ſtated that the goods were delivered to ſuch third party at the requeſt of the vendee. That as to the other queſtions, whether or not there had been an agreement between the plaintiff and the defendant, and how far *Ditchell* occupied, under an agreement with the defendant, they were queſtions proper for the conſideration of the jury."

So, in the caſe of *Gregory* v. *Badcock*, (*e*) which was an action of *aſſumpſit* wherein the plaintiff declared that "in conſideration "that he would permit the defendant to occupy a houſe for four "weeks, at ten guineas per week, the defendant undertook to "pay the ſaid rent." The court of *King's Bench* held that the plaintiff was entitled to recover, though the defendant never took poſſeſſion, and though no other promiſe was proved than that the defendant ſaid ſhe would take the houſe upon

(*e*) *B. R. Mich. Term* 45 *G.* 3. 2 *Smith's Rep.* 18.

the above terms. The word *rent* means the ſum in *groſs*. The letting and hiring is evidence of an expreſs promiſe ſufficient to enable the party to bring *aſſumpſit*.

So, if there be an agreement by deed to demiſe an houſe, by words not amounting to an actual demiſe, but the tenant occupies it, the landlord may maintain an action of *indebitatus aſſumpſit* for uſe and occupation.

Thus, in the caſe of *Elliott*, executor of *Thompſon*, v. *Rogers*, (*f*) which was an action of *aſſumpſit* for uſe and occupation of certain premiſes belonging to the teſtator.

The plaintiff proved that the premiſes belonged to his teſtator; and the occupation by the defendant.

The counſel for the defendant objected to the form of the action, and contended, that the plaintiff ſhould be nonſuited, as the teſtator had demiſed the premiſes by deed; which they produced.

It was read, and began, "Articles of agreement between —— *Thompſon* (the teſtator) and —— *Rogers* the defendant;" by which *Thompſon* agreed to let, and to make a leaſe to the defendant: and it was further agreed, that the expences ſhould be borne between them.

But Lord *Kenyon*, Ch. J., ſaid, "If there was a demiſe by deed the plaintiff could certainly not maintain an action in the preſent form; but this is not a leaſe of the premiſes, it is only an agreement for a leaſe. The defendant does not hold under the deed; and the action is therefore maintainable."

If a tenant of an houſe agrees to pay a ſum of money annually, over and above the rent reſerved, for and towards the goodwill, this does not mean a ſum to be paid as a rent, but a ſum in groſs; and therefore no diſtreſs, or action of *indebitatus aſſumpſit* can be maintained for ſuch annual ſum, as rent.

Thus, in the caſe of *Smith* v. *Mapleback*, (*g*) which was an action of *replevin*: the defendant made cognizance, as bailiff of *William Marmaduke Sellon*, for rent in arrear; to which the plaintiff pleaded in bar, that no rent was in arrear.

(*f*) 4 *Eſp. Rep.* 59. Banniſter v. Uſborne, *K. B. Sittings after Hil. T.* 36 *Geo.* 3. *Peake's Law of Evidence* 242. *S. P.* (*g*) 1 *Term Rep.* 441.

On the trial a caſe was reſerved for the opinion of the court of *King's Bench*, which ſtated, that the plaintiff *William Smith*, being poſſeſſed of certain premiſes, for a long term of years, by indenture of leaſe, dated 25th *March* 1783, demiſed unto *Robert Swin* all that meſſuage or tenement, &c. (the premiſes mentioned in the pleadings) from the day of the date of the ſaid indenture for the term of 8 years, at the yearly rent of 31*l.* 10*s.* payable quarterly on the four uſual quarter days. *Robert Swin* entered and took poſſeſſion of the premiſes under the ſaid leaſe. By indenture dated 12th of *April* 1785, *Robert Swin* in conſideration of 145*l.* 13*s.* aſſigned the premiſes to *William Swin*, for the remainder of the term; who afterwards by indenture, dated 6th *July* 1785, aſſigned over to the ſaid *William Marmaduke Sellon*. *Sellon* entered and took poſſeſſion under that aſſignment. The plaintiff *William Smith* afterwards applied to *Sellon* to take the ſaid premiſes; and the following agreement was entered into between *William Sellon* and *Ann Smith*, as agent for her huſband, the plaintiff. "Agree-"ment between Mr. *Smith* and Mr. *Sellon* for the *Three Jolly* "*Sailors*, at *Rotherhithe*; Mr. *Smith* to have the houſe on the "terms as mentioned in the leaſe, and to pay 8*l.* 10*s.* over and "above the rent annually towards the good will already paid by "Mr. *Sellon*."

The plaintiff *Smith* took poſſeſſion of the premiſes under the ſaid agreement, and the premiſes deſcribed as the *Three Jolly Sailors* in the agreement are the ſame premiſes demiſed by the leaſe of the 25th of *March* 1783, of which the plaintiff *William Smith* at the time of the agreement aforeſaid had the reverſion. The defendant, as bailiff of *William Sellon*, on the 14th of *January* 1786 took the diſtreſs for one quarter's rent.

The queſtion for the opinion of the Court was, whether the defendant as bailiff to *William Marmaduke Sellon*, had a right to diſtrain for any, and what rent?

The Court held, that the annual ſum of 8*l.* 10*s.* was not to be paid as a rent, but only as a ſum in groſs, for which no diſtreſs could be maintained; and gave judgment for the plaintiff.

Aſhhurſt, J. ſaid: "It is not neceſſary to determine whether this agreement amounts to a ſurrender of the whole intereſt, or is

to

to be conſidered as an under-leaſe only; though if it were neceſſary, I ſhould ſay it were intended that the premiſes ſhould be aſſigned for the whole term. But even ſuppoſing it is not ſo, and that it was only intended to be a demiſe from year to year, we muſt neceſſarily give judgment for the plaintiff; becauſe firſt, I am of opinion that the 8*l.* 10*s.*. at all events, was reſerved annually, and not by way of rent; but was intended to be a payment of a ſum in groſs. For the plaintiff was to hold on the terms mentioned in the leaſe, and to pay 8*l.* 10*s.* over and above the rent annually reſerved towards the good-will: that in my apprehenſion does not mean a ſum to be paid as a rent, but a ſum in groſs. But even if it were reſerved as rent, yet it is reſerved annually, therefore it could not be due till the end of the year, and the defendant had no right to diſtrain till that time. Then the year not being at an end, only a proportion of it could be due.

"The plaintiff in his plea in bar, ſays the rent was not in arrear; and it was not ſo; becauſe if the original leſſor were tenant to the leſſee under this agreement, yet as having an intereſt in the premiſes, *Sellon* was to pay the rent to the plaintiff. The conſequence is, that the plaintiff has a rent in his own hands; that balances the rent claimed, and then there was nothing in arrear."

Buller, J. "I am ſatisfied that this was intended to be a ſurrender of the whole term. The leaſe came into the hands of *Sellon* by aſſignment, and *Smith* wiſhed to have it again. And there is no colour to ſay that *Smith* only wanted it for a particular period of the term; for when the agreement says he ſhall have it on the terms of the original leaſe, it means for the whole term. Then as to the 8*l.* 10*s.* that is the conſideration on which the ſurrender is made, to be paid towards the good-will. *Sellon* had paid a ſum of money in groſs in order to get the aſſignment of the leaſe. Inſtead of taking back that ſum which he had paid, he agreed that he would receive it back again by annual payments. As it is not expreſſed on the face of the agreement from what time the payment of the 8*l.* 10*s.* was to commence, it muſt be taken to mean from the time when the agreement was made. Suppoſing it paid in the middle of a quarter, it cannot be applied to rent, becauſe it was to be paid for the good-will, from the time of the agreement. In doubtful caſes where the parties expreſs themſelves inaccurately, the courts will expound their contracts

according to their intention. And it is a maxim in law ſo to judge of contracts as to prevent a multiplicity of actions; therefore this muſt be taken to be a ſurrender, in order to prevent two actions inſtead of one. For if *Sellon* were to recover againſt *Smith*, the latter might recover upon the leaſe againſt the former, which would be abſurd. And it is on that ground, that the courts have conſtrued expreſs words of covenant into a releaſe. As ſuppoſing the obligee of a bond covenanted that he would not ſue on it, the courts ſay that ſhall operate as a releaſe; for if it operated only as a covenant, it would produce two actions. So here it being clear that *Smith* was to have the leaſe back again, it operates as a ſurrender; and *Sellon* cannot recover any more than the 8*l.* 10*s.* which is to be paid annually as a ſum in groſs; and therefore he is entitled to an action of *aſſumpſit* to recover that ſum."

So an action of *indebitatus aſſumpſit* for rent will not lie by a ſtranger in order to try his title; nor where there are two adverſe claimants litigating their title to the premiſes; an ejectment being the proper remedy. (*b*)

When a leaſe is expired, the tenant continues liable to pay rent unleſs he deliver up complete poſſeſſion of the premiſes, or the landlord accepts another tenant.

Thus in the caſe of *Harding* v. *Cretborn*, (*i*) which was an action of *aſſumpſit* for uſe and occupation. The caſe in evidence was, that the defendant had held the premiſes by leaſe under the plaintiff, which leaſe expired in *June* 1792. During the continuance of the leaſe the premiſes had been let to under-tenant, who had continued in poſſeſſion after the leaſe expired; and the queſtion was, whether he had been accepted by the plaintiff, the leſſor, as his tenant, or whether the defendant ſtill continued liable to the rent accrued after the term expired, and during the time the under-tenant had continued in poſſeſſion.

Lord *Kenyon*, Ch. J., ſaid: "When a leaſe is expired, the tenant's reſponſibility is not at an end; for if the premiſes are in poſſeſſion of an under-tenant, the landlord may refuſe to accept the poſſeſſion, and hold the original leſſee liable, for the leſſor is

(*b*) Vide *Peake's Law of Evidence*, 242. *Woodfall's Landlord and Tenant*, 335. (*i*) 1 *Eſp. Rep.* 57.

entitled

entitled to receive the abſolute poſſeſſion at the end of the term. But it may be proved that the leſſor had accepted the under-tenant as his tenant, as by his having accepted the key from the original leſſee, while the under-tenant was in poſſeſſion; by his acceptance of rent from him, or by ſome act tantamount to it."

To prove the plaintiff's acquieſcence to accept the under-tenant as his tenant when the leaſe had expired, a paper was produced, which was a notice from the defendant to the under-tenant, then in poſſeſſion, informing him, that his (the defendant's) term in the premiſes was expired, and ordering him to pay his rent in future to the plaintiff as his landlord. This notice was witneſſed by the plaintiff himſelf.

The counſel for the defendant contended, that the circumſtance of the plaintiff's having witneſſed this notice was concluſive evidence of his acceptance of the under-tenant in lieu of the defendant. But, Lord *Kenyon* ruled,—"That the merely ſubſcribing an inſtrument as a witneſs, ſhould not bind the party, unleſs there was ſome evidence that he was acquainted with its contents at the time, as one might ſubſcribe his name merely as an inſtrumentary atteſtation without any knowledge of what he had ſo atteſted." On this intimation of his lordſhip's opinion, the defendant proved, that the notice had been read over in the plaintiff's preſence, and that he had then ſubſcribed it. His lordſhip ruled, that to be concluſive, and the defendant had a verdict.

So, where rent is reſerved quarterly, it does not diſpenſe with the neceſſity of half a year's notice to quit: but if leſs than half a year's notice is given, and the leſſor neither expreſſes an aſſent or diſſent to the admitting it, and accepts the rent up to the time the tenant quits the premiſes; ſuch conduct of the leſſor will be conſidered as a waiver of the regular notice to quit.

Thus, in the caſe of *Shirley* v. *Newman*, (*k*) which was an action for uſe and occupation. The defendant had been tenant to the plaintiff from year to year, commencing at *Lady-day*; the rent was payable quarterly: at *Chriſtmas* the defendant gave notice that he would quit the premiſes at the *Lady-day* following: the circumſtances as proved on his part were, that this notice to quit had been left at the houſe of the perſon who received the rents of the

(*k*) 1 *Eſp. Rep.* 266.

eſtate, that he had put it on his file of notices, and had neither expreſſed his aſſent or diſſent to the accepting it as a notice to quit. The rent was paid up to *Lady-day* when the tenant quitted: and the action was for rent accruing ſubſequent to that time.

The defendant relied on two grounds; firſt, that the rent, being payable quarterly, a quarter's notice to quit was ſufficient; but ſecondly, that if by law it was not ſufficient, that the defendant's acceptance of the notice to quit at the end of three months, and that being at the end of the year, was a waiver of the notice, which by law would be otherwiſe neceſſary.

It was anſwered by the counſel for the plaintiff, that the manner of paying the rent made no alteration as to the tenancy, which was from year to year; and that it was therefore incumbent on the defendant to have given half a year's notice of quitting, as was required by law, in caſes of ſuch holdings. As to the ſecond point, they inſiſted that the tacit receipt of a notice without any evidence of acquieſcence on the part of the plaintiff, could not be conſtrued into a waiver of the regular notice.

Lord *Kenyon*, Ch. J., ſaid, "that the tenancy was from year to year, and that in ſuch caſes, no notice ſhort of ſix months, and determinable with the year, was ſufficient, and that the mode of payment of the rent, whether half yearly or quarterly, was a collateral matter, and no diſpenſation or qualification of the regular ſix month's notice required by law: but his lordſhip added, that by agreement the parties might diſpenſe with the notice, and the acquieſcence of the parties was preſumptive evidence of ſuch agreement; and he was of opinion, that in this caſe there was evidence of acquieſcence, as the plaintiff had received the notice to quit at the end of three months, and never expreſſed to the defendant any diſſent whatever, which he thought he ſhould have done, if he had meant to have refuſed his aſſent to the defendant's quitting according to the notice."

But, if a lodger goes away, without giving a regular notice to quit, it is no defence to an action for rent which accrued ſubſequent to the time of quitting the lodgings, that the landlord ſtuck up a bill at the window, and endeavoured to let the lodgings; ſuch an act of itſelf not being deemed a ſufficient waiver of a regular notice to quit.

Thus,

Thus, in the caſe of *Redpath* v. *Roberts*, (*l*) which was an action of *aſſumpſit* for uſe and occupation of certain apartments in the plaintiff's houſe: it was brought to recover half a year's rent from *Midſummer* to *Chriſtmas*; the defendant having (as the plaintiff inſiſted) quitted at *Midſummer* without giving any notice.

The defendant's counſel attempted to prove, that after the defendant had quitted at *Midſummer*, the plaintiff had put up a bill at the window, and endeavoured to let the lodgings; but they were in fact not let. This, it was contended, was exerciſing a right to diſpoſe of the apartments, for the time it was ſuppoſed they belonged to the defendant; and evidence that the contract was put an end to at *Midſummer*.

But Lord *Kenyon*, Ch. J., ſaid, "that would afford no anſwer to the plaintiff's action. It was for the benefit of the defendant that the apartments ſhould be let; nor would he infer from the circumſtance of the party's endeavouring to let them; that the contract was put an end to; that there muſt be other circumſtances to ſhow it, and not an act of ſo equivocal a kind. That as the plaintiff had proved the taking of the premiſes, and the payment of the rent, it was incumbent on the plaintiff to prove that tenancy put an end to by expreſs evidence."

If aſſignees of a bankrupt hold premiſes previouſly occupied by the bankrupt, they are only liable for the rent which accrues during the period they occupy the premiſes, though they ſhould enter at the middle of a quarter. (*m*)

Where the owner of a wharf having repreſented himſelf to have a longer term therein than he really had, agreed with a perſon to ſell and aſſign ſuch term to him, and poſſeſſion was thereupon taken; but which poſſeſſion being injurious rather than beneficial to the vendee, in conſequence of the miſrepreſentation of the owner, the agreement was reſcinded, and the premiſes given up to the owner; the vendee is not liable for rent, during the time he occupied the wharf.

(*l*) 3 *Eſp. Rep.* 225. (*m*) Naiſh v. Tatlock *and others*, 2 *H. Bl.* 319, *Vide ante Vol.* 1. *Part II. Chap.* 10. *ſ.* 10.

Thus,

Thus, in the caſe of *Hearn* and another .v. *Tomlin*, (*n*) which was an action for uſe and occupation of a wharf. The plaintiffs had agreed to ſell the wharf to the defendant, and ſtated that the leaſe had 13 years to run. Under this contract the defendant entered into poſſeſſion of the wharf: but it being afterwards diſcovered that the plaintiffs had an intereſt in the premiſes for three years only, the defendant refuſed to compleat his purchaſe. The firſt witneſs proved that ſo far from being a beneficial occupation to the defendant, he had been put to great expence in removing timber to the wharf which was intended to continue there ſome years. Upon this evidence Lord *Kenyon*, Ch. J., ſaid: "To maintain an action for uſe and occupation, it muſt appear that the occupation has been beneficial to the defendant. This occupation was injurious to the defendant, who, had he been told that the plaintiffs had only a term of thee years in the premiſes, would never have entered upon them, and the plaintiffs ſhall not be permitted to make this the ground of an action."

If lodgings are let for purpoſes of proſtitution, the landlord cannot maintain an action for arrears of rent.

Thus, in caſe of *Girarday* v. *Richardſon*, (*o*) which was an action of *aſſumpſit* for uſe and occupation of certain rooms belonging to the plaintiff.

For the defendant it was proved, that ſhe was a woman of the town: that the rooms had been let to her by the wife of the plaintiff, who, it was proved, managed the buſineſs of his houſe in letting the lodgings: that at the time of letting them ſhe was informed the defendant's mode of life, and conſented that ſhe ſhonld be at liberty to receive male viſitors for the purpoſe of proſtitution.

Lord *Kenyon*, Ch. J. ruled, "That under theſe circumſtances the action was not maintainable: that the contract, upon which it was attempted to be ſuſtained, was *contra bonos mores*, and therefore could not ſupport an action." His lordſhip therefore directed a verdict for the defendant.

Where there is a note in writing expreſſing the quantum of rent, or the duration of the term, evidence of a parol agreement to

(*n*) *Peake's Cas. N. P.* 192. (*o*) 1 *Eſp. Rep.* 13. *See alſo* Lloyd v. Johnſon, 1 *Bos. & Pul.* 340.

annul

annul or ſubſtantially to vary the written contract is inadmiſſible; elſe the ſtatute of frauds would be eluded, and the ſame uncertainty introduced by ſuppletory or explanatory evidence, which that ſtatute has ſuppreſſed, in reſpect to the principal object. (*p*)

An executor cannot, in one action, declare for rent due to his teſtator, and alſo for rent due to him in his own right.

Thus, in the caſe of *Hoskin* v. *Quilter* (*q*) which was an action of *indebitatus aſſumpſit* for uſe and occupation; the declaration contained four counts; the three firſt were for rent due to the plaintiff's teſtator; and the fourth count ſtated the rent to be due to the plaintiff for the uſe and occupation of his houſe. After judgment by default, upon error brought, the judgment was reverſed. The Court ſaying, "There being no verdict we can preſume nothing, but that the fourth count is, as it appears, in the plaintiff's own right, which cannot be joined with the others; and the damages are entire.

It is a general rule that a tenant cannot diſpute his landlord's title in an action for uſe and occupation.

Thus, in the caſe of *Lewis* v. *Wallace*, (*r*) which was an action of *aſſumpſit* for the uſe and occupation of a houſe by permiſſion of the plaintiff; the defendant pleaded *nil habuit in tenementis*; and upon demurrer the Court held it not a good plea, as it would be upon a leaſe at common law, becauſe there an intereſt is ſuppoſed to have paſſed from the leſſor; but here the Court muſt take it that there was an expreſs promiſe, and therefore if the plaintiff had an equitable title, or no title at all, yet if the defendant has enjoyed, by permiſſion of the plaintiff, it is ſufficient; and it is not neceſſary for the plaintiff to ſay it is his houſe, any more than in *aſſumpſit* for goods ſold, to ſay they were the goods of the plaintiff.

(*p*) *Per* Blackſtone, *Juſt*, 2 *Bl. Rep.* 1250. *See alſo* 3 *Wils.* 276. *S. P.*
(*q*) *Stra.* 1271. *See alſo Bul. N. P.* 138. *S. C.*
(*r*) *Hill.* 25 Geo. 2. *K. B. Bul N. P.* 139. *See alſo* 2 *Wils.* 211. *Eſp. N. P.* 21.

So,

So, in *Cooke* v. *Loxley*, (*s*) which was alſo an action for uſe and occupation, tried before Lord *Kenyon*, Ch. J. Upon the trial it appeared that the former incumbent had let ſome of the glebe lands to the defendant, who had continued tenant to the preſent incumbent, the plaintiff, and had paid him half a year's rent for the ſame. This action being brought for ſome arrears of rent, the defendant offered to give evidence of the plaintiff's having been ſimonically preſented, of which the defendant was ſtated to be ignorant when he paid the former rent: but Lord *Kenyon* refuſed to receive it, being of opinion that the caſe fell within the common rule, that a tenant ſhould not be permitted to impeach his landlord's title in an action for uſe and occupation. There was a verdict accordingly for the plaintiff. And upon a motion to ſet aſide this verdict, the court of *King's Bench* confirmed his lordſhip's opinion. And Lord *Kenyon* ſaid: "Conforming to the uniform deciſions in all the caſes upon this ſubject, I ruled at the trial, and continue to entertain the ſame opinion, that in an action for uſe and occupation it ought not to be permitted to a tenant, who occupies land by the licenſe of another, to call upon that other to ſhow the title under which he let the land. This is not a mere technical rule, but is founded in public convenience and policy. And the only queſtion here is, whether that rule ſhall ſtill prevail: if it do, it applies equally ſtrong to the preſent caſe as to all others. Here the defendant, who occupied the land, did ſo by the permiſſion of the plaintiff, and then refuſed to pay his rent, under an idea that he might conteſt the plaintiff's right: but the plaintiff could not be ſuppoſed to come to trial prepared to meet ſuch a defence, and to make out his title, ſuch an action as the preſent does not involve the queſtion of title. This differs from the caſes of uſury and ſmuggling alluded to at the bar; for there the contracts themſelves are founded in fraud."

Groſe, J. "It has been ſaid, that the rule of not giving in evidence *nil habuit in tenementis*, in an action for uſe and occupation, is a technical rule: but, in my opinion, no rule is better founded in juſtice and policy than this. The general rule is admitted, that, in ſuch an action as this, the tenant cannot diſpute the landlord's title; and no exception to it has been ſhown applicable to this caſe."

(*s*) 5 *Term Rep.* 4.

But

But it is ſaid, that though a tenant is not allowed to diſpute his landlord's title, yet he may ſhow that the party ſuing had only a temporary intereſt at the time of the demiſe, which has ſince expired; or that he has mortgaged the eſtate to another perſon, who has given the defendant notice to pay his rent to him. To prove theſe facts he muſt be prepared with the regular evidence to ſhow what the plaintiff's title originally was, or the deeds by which he has parted with it: for the mere fact of the defendant having once been tenant is ſufficient to eſtabliſh the plaintiff's caſe. (*t*)

(*t*) *Vide Peake, Law of Evidence*, 244.

CHAPTER

CHAPTER XXI.

Of Contracts to Take and to Repair Houſes, &c.

TO an action for not taking premiſes purchaſed, it is no objection that the vendor had not, at the time of the ſale, ſuch an eſtate or intereſt as he agreed to ſell, provided he obtains ſuch eſtate or intereſt any time before he is called upon by the vendee to deliver an abſtract of his title, and to complete the ſale.

Thus, in the caſe of *Thompſon* v. *Miles*, (*a*) which was an action of *aſſumpſit* brought to recover damages for the breach of an agreement to complete the purchaſe of certain premiſes, compriſing an iron foundery, dwelling-houſe, &c. which the defendant had purchaſed at a public ſale. The particulars of ſale deſcribed the houſe, foundery, &c. as being in thorough repair, held under a leaſe, of which 40 years were unexpired, with a certain right of cartway, for twenty-four years. The declaration only ſet out ſo much of the agreement as reſpected the purchaſe of the foundery, houſe, &c. but ſtated no part of that reſpecting its being in repair, or reſpecting the right of cartway.

For the defendant it was objected, that the whole being an entire purchaſe, under certain particulars compriſed in the agreement, that the whole ought to have been ſet out in the declaration. But Lord *Kenyon*, Ch. J. over-ruled the objection; he ſaid, "That the material part, and upon which the plaintiff's action was grounded, aroſe on the purchaſe of the foundery, houſe, &c. and that the circumſtance of its being in repair was a mere collateral matter; and that of the right of way, an eaſement merely annexed to the houſe and foundery, and ſo need not be ſtated in the declaration."

To prove the duration of the leaſe, as repreſented in the particulars of the ſale, the leaſe itſelf was produced, and it was found that, in point of fact, there were but thirty-nine years unexpired, though the particulars expreſſed that there were forty; but by an

(*a*) 1 *Eſp. Rep.* 184.

agreement

agreement indorſed on the leaſe, the leſſor had thereby agreed to add one year to the unexpired term; ſo that there were, in fact, forty years to come; but this agreement, by the leſſor, was dated after the action brought.

This was objected to as fatal, the term ſold not being the true one: and it was ſtrongly inſiſted on, that the enlargement of the term, being made after the action brought, could not cure it. But Lord *Kenyon* ſaid: "That it had been ſolemnly adjudged, that if a party ſells an eſtate without having title, but before he is called upon to make a conveyance, by a private Act of Parliament gets ſuch an eſtate as will enable him to make a title, that that is ſufficient: that here the plaintiff being enabled to make a title, and the defendant never having applied for it, that he ſhould not be allowed to ſet up againſt the plaintiff, a want of title, though the power of making that title was obtained after the action brought; his lordſhip therefore ruled, that the evidence offered was ſufficient to ſupport the action."

But where *A.* agreed to underlet his houſe to *B.*, the latter paying for the furniture at an appraiſement: it was held that *B.* was excuſed from the performance of the agreement, becauſe *A.*, at the time he quitted the houſe, was in arrear for rent to his landlord.

Thus, in the caſe of *Partridge* v. *Sowerby*, (*b*) which was an action of *aſſumpſit*: Upon the trial it appeared that an agreement was entered into between the plaintiff and the defendant; that the former, who was tenant of a certain houſe, ſhould let the ſame to the latter for a year, from the *Chriſtmas day* then following, and that whatever houſehold furniture ſhould be left, by the plaintiff upon the premiſes, ſhould be appraiſed, and that the defendant ſhould take it at the appraiſed value, and that the money ſhould be paid on or before the 1ſt of *January* then next. At *Chriſtmas day* the defendant quitted the houſe, leaving ſome furniture upon the premiſes; he offered poſſeſſion to the defendant, and gave him notice that a broker would attend to value the furniture. The defendant refuſed to fulfil the agreement, on account of arrears of rent being due from the plaintiff to the landlord.

(*b*) 3 *Bos. & Pul.* 172.

Upon

Upon this evidence Lord *Alvanley*, Ch. J., before whom the cauſe was tried, nonſuited the plaintiff. The counſel for the plaintiff, however, moved for a rule to ſhow cauſe why the nonſuit ſhould not be ſet aſide, urging that as the plaintiff had done every thing to fulfil his part of the agreement, the defendant was bound to perform what he had contracted for.

But the Court were of opinion, "That as the furniture was liable to be diſtrained for the arrears due from the plaintiff to his landlord, the defendant was not bound to take them, and was therefore excuſed from the performance of the agreement."

If a houſe is partially burnt before the day on which the tenant is to take poſſeſſion, it is undecided whether the landlord can maintain an action at law againſt the tenant for not taking poſſeſſion, and alſo for the rent of the premiſes.

Thus, in the caſe of *Phillipſon* v. *Leigh*, (*c*) which was an action on an agreement for the letting and taking of a houſe in *Hanover Square*, from the 1ſt *November*, 1794. The breaches aſſigned were, firſt, that the defendant did not take the houſe purſuant to the agreement; ſecondly, that he refuſed to pay the rent in arrear. There was alſo a general count for uſe and occupation.

The caſe relied on for the defendant was, that the agreement for the houſe was made on the 2d of *November* to commence of the 20th of the ſame month, and that, before the time when the defendant was to take poſſeſſion, a fire broke out in it, by which he was prevented from occupying. And for the defendant was cited *Brown* v. *Quilter*, before Lord *Northington*, in *Andrews*, and another caſe before Lord *Bathurſt*, wherein it had been held that where the houſe had been conſumed by fire the tenant would be diſcharged from payment of the rent.

The counſel for the plaintiff inſiſted, that notwithſtanding the fire, the defendant was liable at law, and cited *Monk* v. *Cooper*, *Stra.* 763. and *Balfour* v. *Weſton*, 1 *Term Rep.* 310.

Lord *Kenyon*, Ch. J. having looked into the caſe in the term reports, ſaid: "That ſitting at *Niſi prius*, he was unwilling to hold any thing contrary to it, though it differed from the

(*c*) 1 *Eſp. Rep.* 397.

caſe

caſe of *Brown* and *Quilter*; but that he was diſpoſed to be of opinion with Lord *Northington*, who was a very great lawyer."

It being proved that the houſe was put into complete repair by the month of *April*, and had been ſince unoccupied, it was agreed to refer the cauſe to arbitration.

2. *Of Contracts to Uſe Lands, and to Repair Houſes, &c. in a Tenant-like and proper Manner.*

The mere relation of landlord and tenant is a ſufficient conſideration to raiſe an implied promiſe on the part of the tenant to uſe and manage his farm in an huſband-like and proper manner,

Thus, in the caſe of *Powley* v. *Walker*, (*d*) which was an action of *aſſumpſit*; and the firſt count of the declaration alleged that on ſuch a day "the defendant became and was tenant to "the plaintiff of a certain farm, &c., in conſideration whereof "he undertook and promiſed not to carry away from the farm any "of the ſtraw, dung, compoſt, &c." The ſecond count ſtated, that for the ſame conſideration the defendant undertook and promiſed to cultivate the land in a good and huſband-like manner, according to the cuſtom of the country; and the third, to manage and cultivate the land according to the uſage and courſe of good huſbandry. After verdict for the plaintiff, it was moved in arreſt of judgment, that there was no conſideration laid for the promiſes; for it was not alleged that the defendant had become tenant to the plaintiff on the terms that he would cultivate the land in a good and huſband-like manner, &c., but merely "that he became "and was tenant to the plaintiff." But the Court ſaid, "That the bare relation of landlord and tenant was a ſufficient conſideration for the promiſes in the declaration;" and therefore they refuſed the rule.

So, in an action (*e*) againſt a tenant upon promiſes that he would occupy the farm in a good and huſband-like manner, according to the cuſtom of the country, an allegation that he had treated the eſtate contrary to good huſbandry and the cuſtom of the country, is proved by ſhewing that he had treated it contrary to

(*d*) 5 *Term Rep.* 373. (*e*) Leigh v. Hewitt, 4 *Eaſt* 154.

the prevalent courſe of good huſbandry in that neighbourhood, as by tilling half his farm at once, when no other farmer there tilled more than a third; though many tilled only a fourth. And it is not neceſſary to ſhow any preciſe definite cuſtom or uſage in reſpect to the quantity tilled.

A tenant from year to year is bound to fair and tenantable repairs, ſo as to prevent waſte or decay of the premiſes; but he is not bound to do ſubſtantial and laſting repairs.

Thus, in *Ferguſon*'s caſe, (*f*) which was an action to recover damages for ſuffering an houſe of the plaintiff's to be out of repair. The caſe on the part of the plaintiff was, that the defendant had rented a houſe of him, as tenant at will, at a rent of 31*l. per annum*, which he had quitted; after the defendant had given up the poſſeſſion, the houſe was found to be very much out of repair, and the plaintiff had an eſtimate made of the ſum neceſſary to put it into complete and tenantable repair, which ſum he ſought to recover in the preſent action. But Lord *Kenyon*, Ch. J. ſaid: "It was not to be permitted to the plaintiff to go for the damages ſo claimed. A tenant from year to year is bound to commit no waſte, and to make fair and tenantable repairs, ſuch as putting in windows and doors that have been broken by him, ſo as to prevent waſte and decay of the premiſes; but in the preſent caſe the plaintiff has claimed a ſum for putting on a new roof on an old worn-out houſe; this, I think, the tenant is not bound to do, and that the plaintiff has no title to recover it."

In the caſe of *Winn* v. *White*, (*g*) the plaintiff declared that the defendant held a certain farm under an agreement to uſe and leave the ſame, when he quitted it, in as good condition as he found it. And it was proved in evidence that the agreement was, that the defendant ſhould leave the premiſes in as good condition as he found them; and that he found them in tenantable repair.

The Court ſaid, "as the plaintiff had proved, that *White* agreed to leave the farm in as good condition as he found it, and that he found it in tenantable repair; this amounted to proof, that he agreed to leave it in tenantable repair."

(*f*) 2 *Eſp. Rep.* 590. (*g*) 2 *Bl. Rep.* 840.

CHAPTER

CHAPTER XXII.

Of Tithes Bargained and Sold; and of Agreements for a Compoſition in lieu of Tithes.

AN action of *indebitatus aſſumpſit* lies for tithes bargained and ſold. (*a*)

So, this action lies for a compoſition in lieu of tithes.

Thus, in the caſe of *Eaton* v. *Sherwin*, (*b*) wherein the plaintiff declared, that the defendant in conſideration that the plaintiff had agreed with the defendant for ſix years; that he would ſuffer him to take the tithes of corn and hay within ſuch a pariſh, that the defendant did agree to pay him, in conſideration thereof, 100*l.*, to wit, 50*l.* half-yearly; and for non-payment of 50*l.* was this action brought, and a verdict for the plaintiff. But afterwards it was moved, in arreſt of judgment, that tithes, being things that lie in grant, cannot paſs by this *parol agreement*. *Pollexfen*, on the other ſide, ſaid, though it is true it would not be good as a leaſe, but yet here was ſufficient cauſe of action ariſing from the mutual promiſe of the parties; and ſo the Court held, "for though it is true no intereſt paſſes by ſuch an agreement, yet he having, according to the agreement, ſuffered him to take the tithes, an action lies for the money upon the other's agreement."

(*a*) *Freeman's Rep.* 234. *pl.* 242. 1 *Vin. Abr.* 275. (*b*) *Skin.* 113. *See alſo Com. Dig.* tit. *Diſmes*, E. 21. *Bac. Abr.* tit. *Aſſumpſit*, A.

PART THE FOURTH.

OF THE

CONSTRUCTION OF CONTRACTS.

AND OF THE

ACTION OF ASSUMPSIT.

CHAPTER I.

Of the Conſtruction of Contracts and Agreements.

A CONTRACT or agreement is to be conſtrued according to its ſenſe and meaning, as collected, in the firſt place, from the terms uſed in it, which terms are themſelves to be underſtood in their plain, ordinary, and popular ſenſe, unleſs they have generally, in reſpect to the ſubject matter, as by the known uſage of trade, or the like, acquired a peculiar ſenſe, diſtinct from the popular ſenſe of the ſame words; or unleſs the context evidently points out that they muſt, in the particular inſtance, and in order to effectuate the immediate intention of the parties to that contract, be underſtood in ſome other ſpecial and peculiar ſenſe. (*a*)

And the general rule which our courts of law have adopted, in the conſtruction of all mercantile inſtruments, is, that the conſtruction ſhould be liberal, agreeable to the real intention of the parties, and conformable to the uſage of trade in general, and of the particular trade to which the contract relates. (*b*)

Pothier, in his very learned treatiſe on obligations, (*c*) lays down the following, (amongſt other) rules for the interpretation of agreements:

(*a*) *Per Lord* Ellenborough, 4 *Eaſt Rep.* 135.
(*b*) *Vide Doug.* 277.
(*c*) *Part* 1. *c.* 1. *ſ.* 1. *art.* 7. *See alſo Evans's tranſlation, vol.* 1. *p.* 53.

1ſt Rule. We ought to examine what was the common intention of the contracting parties, rather than the grammatical ſenſe of the terms. (*d*)

2d Rule. When a clauſe is capable of two ſignifications, it ſhould be underſtood in that which will have ſome operation, rather than that in which it will have none. (*e*)

3d Rule Where the terms of a contract are capable of two ſignifications, we ought to underſtand them in the ſenſe which is moſt agreeable to the nature of the contract. (*f*)

4th Rule. Any thing which may appear ambiguous in the terms of a contract, may be explained by the common uſe of thoſe terms in the country where it is made. (*g*)

5th Rule. Uſage is of ſo much authority in the interpretation of agreements, that a contract is underſtood to contain the cuſtomary clauſes, although they are not expreſſed. (*h*)

6th Rule. We ought to interpret one clauſe by the others contained in the ſame act, whether they precede or follow it.

8th Rule. However general the terms may be in which an agreement is conceived, it only compriſes thoſe things reſpecting which it appears that the contracting parties propoſed to contract, and not others which they never thought of.

10th Rule. When a caſe is expreſſed in a contract, on account of any doubt which there may be whether the engagement reſulting from the contract would extend to ſuch caſe, the parties are not thereby underſtood to reſtrain the extent which the engagement has of right, in reſpect to all caſes not expreſſed.

11th Rule. In contracts, as well as in teſtaments, a clauſe conceived in the plural may be frequently diſtributed into ſeveral particular clauſes.

12th Rule. What is at the end of a phraſe, commonly refers to the whole phraſe, and not only to what immediately precedes it, provided it agrees in gender and number with the whole phraſe.

Theſe rules claim our particular attention, not only on account of the high eſtimation and reſpect in which the opinions of

(*d*) *Vide* 5 *Vin. Abr.* 510. *Cowp.* 600. 1 *Term Rep.* 703.
(*e*) *Vide Co. Lit.* 42. *a*, *Cowp.* 714.
(*f*) *Vide Doug.* 72, 3. 2 *Bos. & Pul.* 565. 5 *Vin. Abr.* 510.
(*g*) *Vide* 5 *Vin. Abr.* 511. 1 *Bl. Rep.* 258. 6 *Term. Rep.* 338. *Powell on Contracts*, 1 *V.* 376. 407. (*h*) *Vide* 8 *Bro. P. C.* 341. *Doug.* 201.

Pothier are always received,* but becauſe theſe rules will be found to be quite conſonant to the principles of the Engliſh law, and to the practice of our courts, in the conſtruction of contracts and agreements, when conſidered with reference to the authorities, which have been already referred to from our own law books, and to a few others which are now about to be mentioned.

In *Plowden*'s Commentaries, (*i*) it is ſaid, "That if any perſons are agreed upon a thing, and words are expreſſed or written to make the agreement, although they are not apt and uſual words, yet if they have ſubſtance in them tending to the effect propoſed, the law will take them to be of the ſame effect as uſual words: for the law always regards the intention of the parties, and will apply the words to that which, in common preſumption, may be given to be their intent. And ſuch laws are very commendable: for if the law ſhould be ſo preciſe as always to inſiſt upon a peculiar form and order of words in agreements, and would not regard the intention of the parties, when it was expreſſed in other words of ſubſtance, but would rather apply the intention of the parties to the order and form of words, than the words to the intention of the parties, ſuch law would be more full of form than of ſubſtance. But our law, which is the moſt reaſonable law upon earth, regards the effect and ſubſtance of words more than the form of them, and takes the ſubſtance of words to imply the form thereof, rather than that the intent of the parties ſhould be void: and the law takes words of ſubſtance that are rarely uſed, to be equivalent to words of ſubſtance that are uſual."

So, in contracts it is not material which of the parties ſpeak the words, if the other agrees to them; for the agreement of the minds of the parties is the only thing the law reſpects in contracts; and ſuch words as expreſs the aſſent of the parties, and have ſubſtance in them, are ſufficient. (*k*)

Lord Ch. J. *Willes*, in the caſe of *Packhurſt* v. *Smith*, (*l*) obſerves, "it is a known maxim in law, that "*benignæ faciendæ ſunt interpretationes chartarum ut res magis valeat quam periat.*" There is another, that "*verba intentioni et non e contrà debent inſervire.*"

* *For an account of Pothier's treatiſe on obligations, vide Sir W. Jones's law of bailments, p.* 29. &c. (*i*) *Fo.* 140. 290. (*k*) *Ibid.* 140. (*l*) *Willes Rep.* 332.

His lordſhip alſo further obſerves, "That it is ſaid in our books that the conſtruction of deeds ought to be favourable, and as near to the apparent intent of the parties as poſſibly may be, and as the law will permit; that too much regard is not to be had to the natural and proper ſignification of words and ſentences, to prevent the ſimple intention of the parties from taking effect; for that the law is not nice in grants, and therefore it doth often tranſpoſe words contrary to their order, to bring them to the intent of the parties: for neither falſe *Latin* nor falſe *Engliſh* will make a deed void, if the intent of the parties doth plainly appear. I have collected theſe rules and maxims from *Littleton*, *Plowden*, *Coke*, *Hobart* and *Finch*, perſons of the greateſt authority. But they are themſelves ſo full of juſtice, and good ſenſe, that they do not want any authority to ſupport them, and I do not know that they were ever yet controverted. On the foundation of theſe rules, whenever it is neceſſary to give an opinion upon the doubtful words of a deed, the firſt thing we ought to enquire into, is, what was the intention of the parties. If the intent be as doubtful as the words, it will be of no aſſiſtance at all. But if the intent of the parties be plain and clear, we ought, if poſſible, to put ſuch a conſtruction on the doubtful words of a deed, as will beſt anſwer the intention of the parties, and reject that conſtruction which manifeſtly intends to overturn and deſtroy it. I admit, that though the intent of the parties be never ſo clear, it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there; nor put a conſtruction on the words of a deed directly contrary to the plain ſenſe of them. But where the intent is plain and manifeſt, and the words doubtful and obſcure, it is the duty of the judges (and this is that *Aſtutia* which is ſo much commended by Lord *Hobart*, p. 277. in the caſe of the Earl of *Clanrickard*) to endeavour to find out ſuch a meaning in the words as will beſt anſwer the intent of the parties."

Lord Ch. B. *Comyns* alſo ſtates, (*m*) "That an agreement or contract ſhall have a reaſonable conſtruction, according to the intent of the parties:" As, if a man agree with *B.* for twenty barrels of ale, he ſhall not have the barrels after the ale is ſpent (*n*)

(*m*) *Dig. tit. agreement (C.) tit.* Action of *Aſſumpſit*, *A.* 5. *Et tit.* Parols. (*n*) *Tit.* Agreement. (C.)

So, if a man promiſe payment without ſaying *to whom*, it ſhall be intended to him from whom the conſideration comes. (*o*)

If he promiſe payment, *according to the rate of* 40*s. per ton*, it ſhall be intended that he will pay for the odd pounds according to the ſame rate. (*p*)

If he promiſe payment upon *Eaſter*-day, if *A.* do not pay the ſame day, *A.* has all the day for payment; and therefore it ſhall be intended of a payment afterwards upon requeſt. (*q*)

Pothier's ſeventh rule of conſtruction is, that in caſe of doubt, a clauſe ought to be interpreted againſt the perſon who ſtipulates any thing, and in diſcharge of the perſon who contracts the obligation.

But the rule of conſtruction adopted by our courts of law is quite the reverſe, namely, that in caſe of doubt, the words of a promiſe, or covenant, ſhall be taken moſt ſtrongly againſt the promiſor or covenantor. (*r*)

Lord *Bacon*, however, in commenting upon the general maxim, ſays, "It is to be noted that this is the laſt rule to be reſorted to, and is never to be relied upon, but where all other rules of expoſition of words fail; and if any other rule come in place, "this giveth place;" and adds, "that it is a point worthy to be obſerved generally of the rules of law, that when they encounter and croſs one another, that be underſtood which the law holds to be worthier and to be preferred; and it is in this particular very notable to conſider, that this being a rule of ſome ſtrictneſs and rigour, doth not as it were its office but in the abſence of other rules, which are of ſome equity and humanity."

Lord *Eldon* alſo, in a very recent caſe, obſerved, (*s*) "It is certainly true that the words of a covenant are to be taken moſt ſtrongly againſt the covenantor; but that muſt be qualified by the obſervation, that a due regard muſt be paid to the intention of the parties, as collected from the whole context of the inſtrument."

(*o*) *Cro. El.* 149. 848. *Poph.* 182. *Noy*, 83. *Cro. Car.* 77.
(*p*) *Yelv.* 134. (*q*) 1 *Rol. abr.* 15. *l.* 45.
(*r*) *Co Litt.* 183. *a. Bac. Abr. tit.* Aſſumpſit, *B.*
(*s*) Browning *v.* Wright, 2 *Bos. & Pul.* 22.

CHAPTER

CHAPTER II.

Of a Penalty; and of Stipulated Damages.

A PENALTY is a forfeiture annexed to a contract or agreement, either for the better enforcing a prohibition, or by way of security for the doing of some collateral act agreed upon between the contracting parties.

Stipulated damages can only be where there is a clear unequivocal agreement, which stipulates for the payment of a certain sum as a liquidated satisfaction fixed and agreed upon by the parties for the doing or not doing certain acts particularly expressed in the agreement.

It is said (*a*) that where the payment of a smaller sum is secured by a larger, it must always be considered as a penalty, and not as liquidated damages.

So, where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid on breach of performance, that must be considered as a penalty. (*b*)

So, where a doubt is stated whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument, in case the act intended to be prohibited be done, that sum shall be construed to be a penalty. (*c*)

But, where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages. (*d*)

(*a*) *Per* Chambre, *Just.* 2 *Bos. & Pul.* 354. (*b*) *Per* Heath, *Just. Ibid.* 353.
(*c*) *Per Lord* Eldon, *Ibid.* 350. (*d*) *Per* Heath, *Just. Ibid.* 353.

On

On the ſubject of liquidated damages, it was ſaid by Lord *Loughborough*, (*e*) "That an agreement for liquidated damages can only be where there is an engagement for the performance of certain acts, the not doing of which would be an injury to one of the parties; or to guard againſt the performance of acts, which, if done, would alſo be injurious. In ſuch caſes an eſtimate of the damages may be made by a jury, or by a previous agreement between the parties, who may foreſee the conſequences of a breach of the engagement, and ſtipulate accordingly."

Theſe general rules and obſervations are ſupported by the following caſes:

In *Rolfe* v. *Peterſon*, (*f*) it was determined, that where a leſſee covenants that in caſe any part or parcel of the ancient meadow or paſture ground, or any other part of the premiſes that had not been in tillage within the laſt twenty years, from the time of making the leaſe, ſhould, during the continuance of the term, be digged up, ploughed or converted into tillage, he ſhall pay the further yearly rent or ſum of 5*l.* for every acre ſo to be broke up or converted into tillage; this increaſed rent is not to be conſidered as a penalty but as a liquidated ſatisfaction fixed and agreed upon between the parties. And therefore if an action is brought for recovering it, a court of equity cannot interpoſe, or give any relief.

So, in the caſe of *Lowe* v. *Peers*, (*g*) which was an action upon a marriage-contract to the effect following: "I do hereby promiſe "Mrs. *Catherine Lowe*, that I will not marry with any perſon beſides "herſelf: If I do I agree to pay to the ſaid *Catherine Lowe* 1000*l.* "within three months next after I ſhall marry any body elſe "Witneſs my hand and ſeal, *Newſham Peers*." This deed was executed in 1757. And in 1767, *Peers* married another woman; whereupon this action was brought: And at the trial, the jury found a verdict for the plaintiff, 1000*l.* damages. But a queſtion was raiſed for the opinion of the Court, whether the 1000*l.*, mentioned in the deed was inſerted as a penalty, or as liquidated damages. And the Court determined, that the deed itſelf liquidated the *certain ſum*: It was aſcertained and fixed between the parties

(*e*) 1 *H. Bl.* 232. (*f*) 2 *Bro. P. C.* 436. *See alſo* Pouſonby v. Adams, 2 *Bro. P. C.* 431. *S. P.* (*g*) 4 *Burr.* 2225.

them-

themſelves; and was therefore the true and proper quantum of the damages.

Lord *Mansfield*, Ch. J. ſaid: "The money was payable upon a contingency, which has happened; and therefore it ought to be paid. There is a difference between covenants in general, and covenants ſecured by a penalty or forfeiture. In the latter caſe, the obligee has his election. He may either bring an action of *debt* for the penalty, and recover the penalty; (after which recovery of the penalty, he cannot reſort to the covenant; becauſe the penalty is to be a ſatisfaction for the whole;) or, if he does not chooſe to go for the penalty, he may proceed upon the covenant, and recover more or leſs than the penalty, *toties quoties*. And upon this diſtinction they proceed in courts of equity. They will relieve againſt a penalty upon a compenſation: but where the covenant is to pay a particular liquidated ſum, a court of equity cannot make a new covenant for a man, nor is there any room for compenſation or relief. As in leaſes containing a covenant againſt ploughing up meadow; if the covenant be 'not to plough,' and there be a penalty, a court of equity will relieve againſt the penalty, or will even go further than that (to preſerve the ſubſtance of the agreement:) But if it is worded 'to 'pay 5*l.* an acre for every acre ploughed up;' there is no alternative, no room for any relief againſt it; no compenſation; it is the ſubſtance of the agreement. Here the ſpecified ſum of 1000*l.* is found in damages: it is the particular liquidated ſum fixed and agreed upon between the parties, and is therefore the proper quantum of the damages."

So, in the caſe of *Fletcher* v. *Dyche*, (*b*) which was an action of *aſſumpſit* for work and labour, and goods ſold and delivered. The defendant pleaded a ſet-off for money due upon a bond, with a condition reciting that the plaintiff had contracted and agreed with the defendant, that he would perform and execute all the ſmith and ironmonger's work to be done and performed in and about the repairs of the pariſh church of *St. Mary-le-Bow*, and which were mentioned and expreſſed in the ſaid particular plan or eſtimate, and in the manner therein directed to be done, and find and provide all the materials for the doing thereof, within the time or ſpace of ſix weeks from the day of the date of the ſaid writing obligatory, at and for the price or

(*b*) 2 *Term Rep.* 32.

ſum

ſum of 118*l.* 18*s.* which was agreed to be paid in three months after the ſaid pariſh church ſhould be completely repaired; and had agreed that if he ſhould not have done and performed the ſaid ſmith and ironmonger's work, within the time thereinbefore mentioned to have been agreed upon and limited for the doing thereof, he would forfeit and pay to the defendant the ſum of 10*l.* for every week after the expiration of the time agreed upon and limited for the doing thereof, until the ſaid ſmith's and ironmonger's work ſhould be completely finiſhed. The plea then ſtated that the defendant did not, within the ſaid ſpace of ſix weeks, from the day of the date of the ſaid writing obligatory, perform or execute all the ſmith and ironmonger's work, &c., but ſuffered and permitted the ſame to remain unfiniſhed for the ſpace of four weeks next after the expiration of the time agreed upon for the doing thereof, whereby the plaintiff became liable to pay to the defendant the ſum of 40*l.*, being at and after the rate of 10*l.* for each and every week of the ſaid four weeks; and the ſum of 40*l.*, and every part thereof, at the time of the commencement of this ſuit, was juſtly due and owing from the plaintiff to the defendant, upon and by virtue of the ſaid writing obligatory, and the condition thereof.

To this plea there was a general demurrer and joinder in demurrer. And the objection upon the demurrer to the plea was, that the weekly payments were in the nature of a penalty, and not as ſtipulated damages; and therefore could not be the ſubject of a ſet-off. But the Court overruled this objection, and determined that the weekly payments were not penalties, but in the nature of liquidated damages, and might be ſet-off againſt the plaintiff's demand.

Aſhhurſt, J. ſaid: "The ſums ſet-off are in the nature of liquidated damages, and are ſuch a kind of penalty, if they may be called by that name, as a court of equity would not relieve againſt. The object of the parties in naming this weekly ſum, was to prevent any altercation with reſpect to the quantum of damages which the defendant might ſuſtain by reaſon of non-performance of the contract. It would have been difficult for the jury to have aſcertained what damages the defendant had really ſuffered by the breach of the agreement; and therefore it was proper for the contracting parties to aſcertain it by their agreement. So that this is a caſe of ſtipulated damages; and it is not to be conſidered as a penalty."

Buller,

Buller, J. "The principal queſtion to be conſidered is, whether this is in the nature of liquidated damages or a penalty. When there is a penalty in the bond it is ſtrange that the ſum mentioned in the condition ſhould be called a penalty, I do not know how there can be an equitable and a legal penalty. But this is as ſtrongly a caſe of liquidated damages as can poſſibly exiſt, and is like the caſe of demurrage. In either caſe it is impoſſible to aſcertain preciſely what damages the party has really ſuſtained; and therefore the contracting parties agree to pay a ſtipulated ſum"

But, in the caſe of *Sloman* v. *Walter*, (*i*) where the plaintiff and defendant were partners in the *Chapter Coffee-houſe*, and upon entering into the partnerſhip it had been agreed that the buſineſs ſhould be conducted entirely by the plaintiff, but that the defendant ſhould have the uſe of a particular room in the houſe whenever he thought proper. And in order to enforce this agreement a bond was entered into by the plaintiff to the defendant in the penalty of 500*l.* After ſome time the defendant demanded the uſe of the room, and being refuſed, brought an action for the penalty of the bond. The plaintiff filed this bill, praying an iſſue to try *quantum damnificatus*, and an injunction in the mean while.

The Lord *Chancellor* * ſaid: "The only queſtion was, whether this was to be conſidered as a penalty, or as aſſeſſed damages. The rule that where a penalty is inſerted merely to ſecure the enjoyment of a collateral object, the enjoyment of the object is conſidered as the principal intent of the deed, and the penalty as only acceſſional, and therefore only to ſecure the damage really incurred, is too ſtrongly eſtabliſhed in equity to be ſhaken. This caſe is to be conſidered in that light. The injunction muſt be continued till the hearing."

The reporter, adds, "That the ſame had been done by the then late Lords Commiſſioners, † in a caſe of *Hardy* v. *Martin*, 7th *May*, 1783, where the plaintiff and defendant had been partners as brandy merchants; on plaintiff's quitting the buſineſs, and ſelling the leaſe and good will of the ſhop to the defendant for 300*l.*, he entered into bond in 600*l.* penalty not to ſell for nineteen years, any quantity of brandy leſs than ſix gallons, within the cities of *London* and *Weſtminſter*, or five miles thereof,

(*i*) 1 *Bro. Ch. C.* 418, * *Thurlow.* † *Lord* Loughborough, *Mr. Juſtice* Aſhhurſt, *and Mr. Baron* Hotham.

or

or to permit any perſon ſo to do in his name, &c. Upon a breach, action brought, and a verdict for the penalty, plaintiff filed this bill, praying that an account might be taken of the actual damage ſuſtained by the defendant, and an iſſue directed for that purpoſe; and that on payment of the damages defendant might be reſtrained from taking out execution for the penalty of the bond. Upon motion to diſſolve the injunction, and cauſe ſhown, the rule was diſcharged.

So, in the caſe of *Aſtley* v. *Weldon*, (*k*) which was an action upon a ſpecial agreement, whereby the defendant, in conſideration of a certain weekly ſalary, agreed with the plaintiff, amongſt other things, that ſhe, the ſaid plaintiff, would, during the term of three years, at the uſual and accuſtomed hours in each day, perform at the plaintiff's theatre, in the ſeveral public performances to be from time to time exhibited on the ſtage of the theatre, when and as often as ſhe ſhould be required: and likewiſe further agreed to attend all rehearſals at the theatre; and alſo that ſhe would, on every night's public performance, be at the theatre, at leaſt one half hour before the public performance ſhould begin. "And laſtly it was agreed on, by and between the ſaid parties, that either of them neglecting to perform that agreement, according to the tenor and effect, and the true intent and meaning thereof, ſhould pay to the other of them the full ſum of 200*l.* of lawful money of *Great Britain*, to be recovered in any of His Majeſty's courts of record at *Weſtminſter*."

The cauſe was tried before Lord *Eldon*, Ch. J., at *Weſtminſter*, in *Trinity* term, 1801; and the agreement having been proved, and alſo that the defendant abſented herſelf from the theatre, and evidence having been adduced to ſhow that, by the regulations of the theatre, the performers are ſubject to certain ſmall fines for late attendance, inebriety, &c. a verdict was found for the plaintiff, with 20*l.* damages; but liberty was reſerved to the plaintiff to enter a verdict for 200*l.*, if the Court ſhould be of opinion that the ſum of 200*l.*, mentioned in the agreement, was to be conſidered in the nature of liquidated damages.

The Court, after argument, held, that the ſum mentioned in the agreement was in the nature of a penalty, and not of liquidated damages: and Lord *Eldon*, Ch. J. ſaid, "When the cauſe came before me, at *niſi prius*, I felt as I have often done before in

(*k*) 2 *Bos. & Pul.* 346.

conſidering

conſidering the various caſes on this head, much embarraſſed in aſcertaining the principle on which thoſe caſes were founded: but it appeared to me that the articles in this place furniſhed a more ſatisfactory ground for determining whether the ſum of money therein mentioned ought to be conſidered in the nature of a penalty, or of liquidated damages, than moſt others which I had met with. What was urged in the courſe of the argument has ever appeared to me to be the cleareſt principle, viz. that where a doubt is ſtated whether the ſum inſerted be intended as a penalty or not, if a certain damage leſs than that ſum is made payable upon the face of the ſame inſtrument, in caſe the act intended to be prohibited be done, that ſum ſhall be conſtrued to be a penalty. The caſe of *Sloman* v. *Walker*, did not ſtand in need of this principle: for there, by the very form of the inſtrument, the ſum appeared to be a penalty; in which caſe a court of equity could never conſider it as liquidated damages, but muſt direct an iſſue of *quantum damnificatus*. A principle has been ſaid to have been ſtated, in ſeveral caſes, the adoption of which one cannot but lament, namely, that if the ſum would be very enormous and exceſſive, conſidered as liquidated damages, it ſhall be taken to be a penalty, though agreed to be paid in the form of contract. This has been ſaid to have been ſtated, in *Rolfe* v. *Paterſon*, (*l*) where the tenant was reſtrained from ſtubbing up timber. But nothing can be more obvious than that a perſon may ſet an extraordinary value upon a particular piece of land, or wood, on account of the amuſement which it may afford him. In this country, a man has a right to ſecure to himſelf a property in his amuſements: and if he chuſes to ſtipulate for 5*l.* or 50*l.* additional rent upon every acre of furze broken up, or for any given ſum of money upon every load of wood cut and ſtubbed up, I ſee nothing irrational in ſuch a contract; and it appears to me extremely difficult to apply, with propriety, the word "exceſſive" to the terms in which parties chooſe to contract with each other. There is, indeed, a claſs of caſes, in which courts of equity have reſcinded contracts on the ground of their being unequal. It has been held, however, that mere inequality is not a ground of relief. The inequality muſt be ſo groſs that a man would ſtart at the bare mention of it. Neceſſity, in theſe caſes, ſeems to have obliged the courts to admit a principle nearly as looſe as that to which I have before alluded. But with reſpect to the caſe of

(*l*) *Ante*, 538.

Ponſonby

Ponſonby v. *Adams*, (*m*) the landlord may have ſet a value upon the reſidence of a particular tenant on his eſtate; and why ſhould he not upon that ground have ſtipulated, that if ſuch tenant ſhould ceaſe to reſide there, his rent ſhould riſe to 150*l.*? Both in *Rolfe* v. *Peterſon*, and *Ponſonby* v. *Adams*, I ſhould have ſaid, that what was matter of contract, bottomed on a good conſideration, ſhould not be looked upon as penalty, but ſhould be conſidered as rent reſerved, or liquidated damages. In *Lowe* v. *Peers*, it is quite clear that the breach of promiſe of marriage was to be compenſated for in damages. It was a contract, that in caſe the party failed to perform his promiſe, he ſhould pay the ſum of 1000*l.* The caſe of *Fletcher* v. *Dyche*, (*n*) is very ſtrongly to the preſent purpoſe. In that caſe, a bond in a penal ſum was conditioned to perform certain work within a certain time, or to pay 10*l.* for every week beyond that time. The 10*l.* per week was ſecured by the penalty of the bond: and to have ſaid that one term of a contract, ſecured by a penal ſum, ſhould alſo be a penal ſum, would have been abſurd. Indeed, Lord *Hardwicke*, in *Roy* v. The Duke of *Beaufort*, (*o*) was of opinion, that a perſon who had entered into a bond, with a penalty of 100*l.* if he poached, muſt have paid the 100*l.* if he had committed any act which amounted to poaching. But ſuppoſe the Duke had taken a bond in a penalty of 100*l.*, with condition that the obligor ſhould not kill a partridge, or if he did, that he ſhould pay 5*l.*, in that caſe it is moſt clear that the 5*l.* muſt have been conſidered as liquidated damages. With reſpect to the caſe of *Hardy* v. *Martin*, (*p*) I do not underſtand why one brandy merchant who purchaſes the leaſe and goodwill of a ſhop from another, may not make it matter of agreement that if the vendor trade in brandy within a certain diſtance, he ſhall pay 600*l.*; and why the party violating ſuch agreement ſhould not be bound to pay the ſum agreed for, though if ſuch agreement be entered into in the form of a bond, with a penalty, it may, perhaps, make a difference. I much wiſh that the principle laid down by Lord *Somers*, in *Prec.* in *Chan.* (*) had been adhered to. Let us then ſee what this caſe amounts to. It was contended, at the trial, that the laſt clauſe is not in the form of a penal bond. It is thus: "and laſtly, it is hereby agreed that either party failing to perform their undertaking, ſhall pay to the other 200*l.*" *Primâ facie* this certainly is contract,

(*m*) 2 *Bro. P. C.* 431. (*n*) *Ante*, 539. (*o*) 2 *Atk.* 190.
(*p*) *Ante*, 541. * 487.

and

and not penalty; but we muſt look to the whole inſtrument. In conſideration of the defendant's ſervices, the plaintiffs undertake to pay her 1*l.* 11*s.* 6*d.* per week, and alſo her travelling expences. It would be abſurd to hold, that becauſe the 1*l.* 11*s.* 6*d.* is a liquidated ſum, therefore the plaintiff could not be called upon for more; and yet, that in conſequence of his non-payment of the defendant's travelling expences, he ſhould be liable to the whole ſum of 200*l.*, becauſe thoſe expences are not aſcertained. Again, there are many inſtances of the defendant's miſconduct, which are made the ſubjects of ſpecific fines by the laws of the theatre. Are we then to hold, that if the defendant happens to offend in a caſe which has been ſo provided for by thoſe laws, ſhe ſhall pay only 2*s.* 6*d.* or 5*s.*; but if ſhe offend in a caſe which has not been ſo provided for, ſhe ſhall pay 200*l.* I can find nothing in thoſe articles which can ſatisfy my mind, judicially, that the 200*l.* is to be paid in one caſe, and not the other. The clauſe is general, and contains no exception. If that be ſo, the caſe of *Fletcher* v. *Dyche* is an authority ſtrongly in point. It therefore does appear to me that the true effect of this agreement is, to give the plaintiff his option, either to proceed upon the covenants *toties quoties*, or, upon the firſt breach, to proceed at once for the 200*l.*, out of which he may be ſatisfied for the damage actually ſuſtained, and which may ſtand as a ſecurity for future breaches."

So, in the caſe of *Smith* v. *Dickenſon*, (*q*) which was an action of *aſſumpſit* upon the following agreement: "In conſideration "that the plaintiff would communicate to the defendant the nature of an invention, for which the plaintiff intended to take "out a patent, the defendant undertook that he would not avail "himſelf or take any advantage of ſuch communication, under a "penalty of 1000*l.*" The Court were clearly of opinion, that the "word *penalty*," uſed in the agreement, effectually prevented them from conſidering the ſum mentioned as *liquidated* damages.

But, in the caſe of *Orr* v. *Churchill*, (*r*) which was an action of debt on bond. It appeared that the defendant, together with *William Cleland* and *Daniel Stewart*, were *jointly* and *ſeverally* bound, in the penal ſum of 4470*l.* 2*s.* 2*d.* conditioned as follows: "Whereas the above-bounden *Walter Cleland* hath received from "the above named *John Orr*, 6,017 ſtar pagodas, for which

(*q*) 3 *Bos. & Pul.* 630. *Et ante*, 481. (*r*) 1 *H. Bl.* 227.

" he has given to the ſaid *John Orr* ſets of his own private " bills, upon Meſſrs. *Baillie, Pocock*, and Co., payable to the " order of the ſaid *John Orr*, in manner hereinafter men- " tioned; that is to ſay, one ſet in triplicate, dated *Calcutta, Janu- " ary* 29th, 1787, for 2044*l.* 3*s.* 4*d.*, payable 365 days after ſight thereof; and the other ſet in triplicate, bearing even date with theſe preſents for 190*l.* 18*s.* 9*d.* payable four months after ſight thereof, " of: and to ſecure the due acceptance and payment of ſuch bills " reſpectively, they, the ſaid *Henry Churchill* and *Daniel Stewart*, " have propoſed and undertaken to become bound, together with " the ſaid *Walter Cleland*; and that in the event of the ſaid bills, " or either of them, being proteſted for non-acceptance and " non-payment, that they, the ſaid *Walter Cleland, Henry Churchill*, " and *Daniel Stewart*, or one of them, ſhall and will, upon producing " to them or either of them ſuch bill, with its proteſt, well and truly " pay to the ſaid *John Orr*, or his order, if demanded in *England*, " the full amount of ſuch bill or bills which ſhall be ſo proteſted, " together with intereſt thereupon, of 5*l. per centum per annum*, " from the day of the date or dates of ſuch bill or bills, up to the " day of ſuch payment, by way of penalty."

The Court held, that the plaintiff was entitled to recover no more than the amount of the bills, with intereſt from the time of their becoming due.

Lord *Loughborough*, Ch. J. ſaid, " I do not go on the denomination given by the inſtrument: for whatever that may be in this caſe, that could not, by any poſſibility, have been an agreement for liquidated damages; which can only be where there is an engagement for the performance of certain acts, the not doing of which would be an injury to one of the parties, or to guard againſt the performance of acts, which, if done, would alſo be injurious. In ſuch caſe an eſtimate of the damages may be made by a jury, or by a previous agreement between the parties, who may foreſee the conſequences of a breach of the engagement, and ſtipulate accordingly. But where the queſtion is concerning the non-payment of money in circumſtances like the preſent, the law having, by poſitive rules, fixed the rate of intereſt, has bounded the meaſure of damages; otherwiſe the law might be eluded by the parties. It may often indeed happen, that the damages ſuſtained by a party contracting, by the non-payment of money at the time agreed on, may, by the particular arrangement of his affairs, be greater than the compenſation recovered by computing

the intereſt; but where money has a real rate of intereſt and value, the other party is not to be compelled to pay more than the law has declared to be ſuch rate and value."

In the caſe of a *penalty*, though the plaintiff has his election to proceed either for the recovery of the penalty, or for general damages for breach of the agreement, yet having once made his election, and recovered the penalty, he is bound by it, and cannot bring any action to recover further ſatisfaction. (*s*)

But a party cannot, by tendering the penalty, or ſtipulated ſum, be let off from a *ſpecific performance* of an agreement.

Thus, in the caſe of *Howard* v. *Hopkins*, (*t*) where it appeared that articles for the purchaſe of an eſtate had been entered into, with a proviſo, that if either ſide ſhould break the agreement, he ſhould pay the other 100*l.*: and one ground of argument, on behalf of the vendor, againſt a bill for a ſpecific performance, was, that it was the intention of the parties that upon payment of 100*l.* by either of them, the agreement ſhould be abſolutely void. Lord Chancellor *Hardwicke* ſaid, "As to the defence of the ſtipulated ſum, I cannot conſider that as a ground to let off either party when they pleaſe, it being no more than a common caſe with a penalty, which might be inſerted by the vendee, in order to be paid for his trouble of viewing and meaſuring the eſtate, &c., ſuppoſing the defendant ſhould not be able to make out a title. In all theſe caſes, where penalties are inſerted in a caſe of non-performance, this has never been held to releaſe the parties from their agreement, but they muſt perform it notwithſtanding."

(*s*) Bird v. Randall, 1 *Bl. Rep.* 373. 387. *Et vide ante*, 539.
(*t*) 2 *Atk.* 371. *See alſo Vin. Abr.* tit. *Obligations*, T.

CHAPTER III.

Of the Action of Aſſumpſit.

THE preſent work being wholly confined to the law of contracts and agreements, as ſettled in the action of *aſſumpſit*, it is intended in this chapter to take a ſhort view of the nature and hiſtory of this ſpecies of action, and to point out in what caſes it may be brought, &c. I ſhall therefore conſider the ſubject in the following order:

1. *Of the Nature and Hiſtory of the Action of* Aſſumpſit.

2. *In what Caſes this Action lies, though there be another Remedy; and of the Plaintiff's Right of Election.*

3. *By and againſt whom the Action may be brought.*

4. *At what Time this Action lies upon a Contract to pay Money, or do ſome other Act at ſeveral Days: and within what Time this Action muſt be brought by the Statute of Limitations.*

1. *Of*

1. *Of the Nature and Hiſtory of the Action of Aſſumpſit.*

The word *aſſumpſit*, according to its legal import, ſignifies a voluntary promiſe made either verbally, or in writing without ſeal, upon a good conſideration, whereby a man aſſumes and takes upon himſelf to perform or pay any thing to another. And it is commonly expreſſed by the *Civilians* under the term *pactum*. (*a*)

An action of *aſſumpſit* is the remedy pointed out by the law whereby a man may recover damages, or in other words obtain a pecuniary ſatisfaction for an injury ſuſtained by the breach or non-performance of any contract or promiſe not under ſeal. (*b*) It ſhould, however, be obſerved, that though it is uſually termed an *action of aſſumpſit*, as being founded upon a contract or promiſe, yet technically and properly conſidered, it is merely a ſpecies of the *action of treſpaſs on the caſe*. (*c*)

There are two kinds of actions of *aſſumpſit*. Firſt, a general or *indebitatus aſſumpſit*, which lies for the recovery of a precedent debt for monies, ſervices and works; the ſale or hire of goods; or the purchaſe, aſſignment or uſe of lands, &c. Secondly, a *ſpecial aſſumpſit*, which lies for the recovery of damages upon promiſes made either to pay or repay money, or to do or forbear ſome act. (*d*)

The action on the caſe upon an *aſſumpſit* is ſaid * to have been introduced into the law in the reign of *Henry* 4., and that upon its introduction it was found ſo convenient a remedy that many lawyers wiſhed to apply it to all caſes of non-performance of promiſes: But length of time, and powerful motives were neceſſary to induce the courts to admit this novel form of action. It was thought ſomewhat harſh to give the name of treſpaſs to a mere breach of promiſe. However, what appears to have given riſe to this ſpecies of action was the want of ſome clear and adequate remedy for the breach of contracts and agreements not under ſeal. The remedies then in uſe for the breach of contracts, were either by action of covenant or debt: but it had been long

(*a*) *Terms de Ley. Cowel Inſt.* (*b*) *Vide* 1 *Bl. Com. Vol.* 2. *p.* 397. *Vol* 3. *p.* 158.
(*c*) *Vide Bac. Abr.* tit. *Actions on the Caſe, Gilb. C. P.* 6.
(*d*) *Tidd's Prac.* 3. *Bul. N. P.* 128. * *Reeve's Hiſt. Eng. Law, Vol.* 3. *c.* 18.

held that an action of covenant muſt be grounded on a *ſpeciality*; therefore where the parties had not bound themſelves by writing under ſeal, that remedy failed. And with reſpect to the action of debt, it could only be maintained for ſome precedent debt, or for the non-performance of an agreement, by which *a ſum certain* was ſtipulated to be paid; and in this action the defendant might diſcharge himſelf by wager of law, unleſs the demand was founded upon a ſpecialty. (*e*)

Hence it appears, that where parties had bound themſelves in any contract or agreement, not under ſeal, to perform any act, except for the payment of money, and nothing had been done in execution thereof, and one of the parties had refuſed to fulfil his part of it, the injured party could only reſort to a court of equity for relief; but this court could only compel a ſpecific performance of the thing contracted for; it could not give damages for the breach of an agreement, this being the ſole province of a jury to eſtimate.

To obviate therefore theſe and the like defects in the law, and to legitimate an action of a more effectual nature in matters of contract was very deſirable.

Several actions of this kind appear to have been brought before they were allowed and recognized by a judicial deciſion in their favour.

The firſt caſe upon record is in 2 *Hen.* 4. It was an action againſt a carpenter, upon a promiſe to build a houſe within a certain time, but which he had failed in performing. An objection was ſtated that this was in covenant, and, as no writing was produced, the action could not be maintained. This was ſupported by *Brian*, who at the ſame time conceded that, perhaps, if the writ had alleged that the work had been begun, and had afterwards through negligence been ſtopped, the action might have been maintainable; thereby adhering to former determinations reſpecting *malfeazance*, and caſes of negligence. He pronounced, however, this remedy inadequate where the contract was executory, and where the only complaint againſt the defendant was *nonfeazance* or non-performance: and upon this objection the cauſe was diſmiſſed. (*f*)

(*e*) *Reeve's Hiſt. Eng. Law, Vol.* 3. *C.* 18. (*f*) 2 Hen. 4. 3. *b.*

In

In the eleventh year of the ſame king, another cauſe exactly ſimilar to the former came before the court: (*g*) the ſame objections were raiſed; and though the like conceſſion was made in ſtronger terms, yet the cauſe was diſmiſſed on the ſame ground as the former. Thus, the court determined ſtrongly againſt this form of action upon its firſt introduction, notwithſtanding it was admitted by the judges that for the breach of ſuch a contract there was no adequate remedy. It is obſerved by *Brook*, (*h*) that in theſe caſes there was no conſideration alleged; that it was *nudum pactum*, and therefore the action could not lie: but this, though it might have been an additional objection, was not taken at the time, and both the cauſes appear, by the report, to have been diſmiſſed upon the ſame objection, namely, the want of a written covenant; as well as from the prevailing opinion which confined the action upon the caſe to inſtances of *malfeazance* and negligence, where the defendant had really done ſomething.

From the reception which this ſpecies of action met with, the queſtion appears not to have been revived until the reign of *Hen.* 6., when all the topics, which had been canvaſſed in the reign of *Hen.* 4., were again brought forward. But at this period the judges began to ſee the neceſſity and utility of this form of action; they therefore manifeſted great inclination to overrule the objections which were thrown in its way: for the diſtinction which had formerly been made between a non-performance, and a negligence or *malfeazance*, was now denied.

Thus, in an action on the caſe for *nonfeazance* againſt a perſon for not making a mill by a certain day as he had undertaken: upon the ſame objection being raiſed to the maintenance of this action as had been ſtated in the time of *Henry* 4., it was anſwered by ſome of the juſtices, that if one made a covenant to cover a houſe by a certain day, and he neglecting to do it, the rain came in and damaged the houſe, the owner might have an action of *treſpaſs on the caſe* for the damage.

So, if a man neglected to make a ditch according to his covenant, and my corn was thereby damaged: or if my covenant ſervant neglected to do what he was ordered. (*i*)

(*g*) 11 Hen. 4. 33. (*h*) Tit. *Action ſur Caſe*, 40. (*i*) 3 Hen. 6. 36.

89, in the 14 *Hen.* 6. an action on the case was brought against a man who had undertaken to procure certain persons to give releases, which undertaking he did not perform; the same arguments were used against the maintenance of this action, as against the former. It was said, that this being merely a *non-feazance*, the remedy must be in covenant. But this was explicitly denied by *Juyn*, Ch. J., and *Paston*; and they stated the common cases of a carpenter, a surgeon, and the like; who, if they made an undertaking, and did nothing in performance of it, were liable to an action on the case, and the party should not be driven to an action of covenant. (*k*)

A few years afterwards (*l*) a similar action was brought against a man for not delivering wine according to his promise; and the same arguments were again brought forward against the form of the action; but the same answers were given to them. The parties, however, in this case having compromised the action, there was no judicial determination of the point. But it sufficiently appears, from what had been thrown out, that the opinions upon this question were now materially changed; and the best lawyers began to think that an action on the case was a proper remedy to recover damages for the non-performance of an agreement, as well as for any *misfeazance* in the performance of it. Accordingly we find it laid down by *Newton*, J. (*m*) that if land was sold, the vendor might have debt for the money, and the vendee might have an action on the case if he was not enfeoffed of the land; and this passed without any contradiction.

It is supposed (*n*) that the promise, mentioned in the reports of this period, was an express undertaking which could be clearly proved, and not such an implied promise as was in after-times pronounced to arise in point of law in cases where a debt or duty were previously due.

The action upon the case now began to be adapted to almost all cases where the common law before furnished no clear and adequate remedy; sometimes it was brought instead of the old established actions of *deceit*, *conspiracy*, *detinue*, and others which were found less adequate than this to obtain the ends of justice: It was also the usual mode of redress in most instances of *mal-*

(*k*) 14 Hen 6. 18. (*l*) 21 Hen. 6. 55. (*m*) 22 Hen. 6. 44.
(*n*) *Reeve's Hist Eng Law*, *Vol.* 3. 396. *See also Pothier on Obligations*, *by Evans*, *Vol.* 1. 306. *n.* (*b*).

feazance

feazance or negligence, whether of private perſons or of thoſe in office; and the party thereby received a ſatisfaction in damages for the wrong ſuſtained. (*o*) Numerous are the reports of caſes of this kind which have come down to us. Theſe afforded a ground-work to extend the action by a reaſonable analogy to the various caſes of contract to which it has ſince been applied.

The opinions delivered in the time of *Henry* 6. and *Edward* 4. in favour of actions upon the caſe for the non-performance of a promiſe were confirmed by a train of deciſions in the reigns of *Henry* 7 and 8. And it is remarked by the learned author, (*p*) from whoſe laborious and uſeful work the greateſt part of this account of the action is taken, that the prodigious advantage of this common law remedy, to ſubſtantiate promiſes and undertakings, was ſoon diſcerned by the legiſlature, which, on this account, as well as on account of the other applications that were made of this action, paſſed an act (*q*) which gave to the action upon the caſe the ſame proceſs as in *treſpaſs* and *debt*.

During the reigns of *Hen.* 7. and 8. the action of *aſſumpſit* was not confined to caſes grounded upon expreſs promiſes only, but it had become the practice to bring this ſpecies of action on the caſe for the recovery of ſimple contract debts, by ſtating the debt to ariſe upon a promiſe to pay, and then, when a debt was proved, conſtruing ſuch debt to imply a legal promiſe. (*r*) But the action of *aſſumpſit*, both upon *expreſs* and *implied* promiſes, was not fully eſtabliſhed until the determination of *Slade's* caſe, *Trin.* 44 *Eliz.* (*s*) It was an action on the caſe upon an *aſſumpſit* in the court of *King's Bench*, brought by *John Slade* againſt *Humphrey Morley*, wherein the plaintiff declared, that whereas the plaintiff 10th *November*, 36 *Eliz.* was poſſeſſed of a cloſe of land in *Halberton*, in the county of *Devon*, called *Rack Park*, containing, by eſtimation, eight acres, for the term of divers years then and yet to come, and being ſo thereof poſſeſſed, the plaintiff on the ſaid 10th *November* had ſowed the cloſe with wheat and rye, and which were grown into blades; the defendant, in conſideration that the plaintiff, at the requeſt of the defendant, had bargained and ſold to him the ſaid blades of wheat and rye growing upon the ſaid cloſe, (the tithes due to the rector, &c. excepted,)

(*o*) *Vide Reeve's Hiſt. Eng. Law, Vol.* 3. *p.* 396, 7.
(*p*) *Vol.* 4 *cap.* 27. (*q*) 19 Hen. 7. *c.* 9.
(*r*) *Reeve's Hiſt. Eng. Law, Vol.* 4. *c.* 39. (*s*) 4 *Co.* 92. *b.*

excepted,) aſſumed and promiſed the plaintiff to pay him 16*l.* at the feaſt of *St. John Baptiſt* then to come; and for the non-payment thereof at that feaſt, the plaintiff brought this action. The defendant pleaded *non aſſumpſit modo et forma*; and upon the trial of this iſſue, the jury found a ſpecial verdict, ſtating, "that the defendant bought of the plaintiff the wheat and rye in blades growing upon the ſaid cloſe, as ſet forth in the declaration, but that between the plaintiff and the defendant there was no other promiſe or aſſumption than the mere bargain." Two objections were made againſt the maintenance of this action; firſt, that the plaintiff upon this bargain might have the ordinary remedy by action of debt, which is an action formed in the regiſter, and therefore he ſhould not have an action on the caſe, which is an extraordinary action, and not limited within any certain form in the regiſter: Secondly, that the maintenance of this action takes away the defendant's benefit of *wager of law*, and ſo bereaves him of the benefit which the law gives him, which is his birth-right; for peradventure the defendant has paid or ſatisfied the plaintiff in private betwixt them, of which payment or ſatisfaction he has no witneſs; and therefore it would be miſchievous if he ſhould not wage his law in ſuch caſe.

Upon theſe objections, Lord *Coke* obſerves, that the courts of *King's Bench* and *Common Pleas* were divided; the juſtices of the *King's Bench* held, that the action (notwithſtanding ſuch objections) was maintainable, and the court of *Common Pleas* held the contrary. But for the honour of the law, and for the quiet of the ſubject in the ſettling of ſuch diverſity of opinions, the caſe was openly argued before all the Juſtices of *England*, and the Barons of the *Exchequer*. And after many conferences between the juſtices and barons, it was reſolved, that the action was maintainable, and that the plaintiff ſhould have judgment. And in this caſe theſe points were reſolved; (*t*) "firſt, that although an action of debt lies upon the contract, yet the bargainor may have an action upon the caſe, or an action of debt at his election, and that for three reaſons or cauſes: firſt, in reſpect of infinite precedents in the reigns of King *Hen.* 6. *Edw.* 4. *Hen.* 7. & 8., by which it

(*t*) *Vide Vaughan's Rep.* 101. *where theſe reſolutions are ſtrongly impugned. But ſee* 3 *Wooddeſon*, 168. *n.* (*c*).

appears,

appears, that the plaintiffs declared, that the defendants, in conſideration of a ſale to them of certain goods, promiſed to pay ſo much money, &c.; and in which caſes the plaintiffs had judgment, to which precedents and judgments being of ſo great number, in ſo many ſucceſſions of ages, and in the ſeveral times of ſo many reverend judges, the juſtices in this caſe gave great regard; and ſo the juſtices in ancient times, and from time to time did as well in matters of form as in deciding of doubts and queſtions, as well at the common law as in conſtruction of Acts of Parliament. And it was reſolved in this caſe, that the multitude of the ſaid judicial precedents, in ſo many ſucceſſions of ages, well prove that in the caſe at bar the action was maintainable. The *ſecond* cauſe of their reſolution was divers judgments and caſes reſolved in our books where ſuch action on the caſe upon *aſſumpſit* has been maintainable, when the party might have had an action of debt. *Thirdly*, it was reſolved, that every contract executory, imports in itſelf an *aſſumpſit*, for when one agrees to pay money, or to deliver any thing, thereby he aſſumes or promiſes to pay, or deliver it; and therefore when one ſells any goods to another, and agrees to deliver them at a day to come, and the other, in conſideration thereof, agrees to pay ſo much money at ſuch a day, in that caſe both parties may have an action of debt, or an action on the caſe upon *aſſumpſit*; for the mutual executory agreement of both parties imports in itſelf reciprocal actions upon the caſe, as well as actions of debt; and therewith agrees the judgment in *Read* and *Norwood*'s caſe. (*u*) *Fourthly*, it was reſolved, that the plaintiff in this action of *aſſumpſit* ſhould recover damages not only for the ſpecial loſs (if any) which he had ſuſtained, but alſo for the whole debt, ſo that a recovery or bar in this action would be a good bar in an action of debt brought upon the ſame contract. *Fifthly*, it was reſolved, that in ſome caſes it would be miſchievous if an action of debt ſhould be brought, and not an action of *aſſumpſit*, as in the caſe *inter Pecke* and *Redman*. (*v*) They bargained together, that for a certain conſideration *Redman* ſhould deliver to *Pecke* twenty quarters of barley yearly during his life, and for non-delivery in one year, it is adjudged that an action well lies, for otherwiſe it would be miſchivous to *Pecke*; for if he ſhould be driven to his action of debt, then he himſelf could

(*u*) *Pl. Com.* 128. (*v*) *Dyer*, 113. *a*.

never

never have it, but only his executors or adminiſtrators; for debt does not lie in ſuch caſe, till all the days are incurred; and that would be contrary to the bargain and intent of the parties, for *Pecke* provides it yearly for his neceſſary uſe. So, if a ſum is given in marriage to be paid at ſeveral days, an action upon the caſe lies for non-payment at the firſt day, but no action of debt lies in ſuch caſe till all the days are paſt. *Sixthly*, it was ſaid, that an action on the caſe upon *aſſumpſit* is as well a formed action as an action of debt; for the regiſter (*w*) has two ſeveral actions, that is to ſay, action on the caſe upon *aſſumpſit*, and alſo an action of debt. And in all caſes when the regiſter has two writs for one and the ſame caſe, it is in the party's election to take either. And as to the objection which was made, that it would be miſchievous to the defendant that he ſhould not wage his law, foraſmuch as he might pay the debt in ſecret; it was anſwered, that it ſhould be accounted his folly that he did not take ſufficient witneſſes with him to prove the payment he made; but the miſchief would be rather on the other party, for now experience proves that men's conſciences grow ſo large that the reſpect of their private advantage rather induces men (and chiefly thoſe who have declining eſtates) to perjury. And therefore in debt, or other action, where wager of law is admitted by the law, the judges, without good admonition and due examination of the party, do not admit him to wage his law, but leave the queſtion to be determined by trial by jury, which excludes the evidence of the parties themſelves."

Soon after this determination, the action of *aſſumpſit* became the prevailing action in moſt caſes of contract and agreement without ſeal: And in modern times it has been ſo much extended, particularly in commercial engagements between merchants and others, that it is obſerved, by the author of the Law of *Niſi Prius*, (*u*) "that of all actions founded upon contract, none is "now in more general uſe than the action of *aſſumpſit*."

(*w*) *Vide F. N. B.* 94. A. *But ſee Woodeſon's Lectures, Vol.* 3. *p.* 168. *a. c.*

(*x*) *Part* 2. *Cap.* 2.

2. *In what Caſes this Action lies, though there be another Remedy; and of the Plaintiff's Right of Election.*

Where ſeveral remedies are given by the law, the party to whom they are given may elect to take which of them he will. (*y*)

In many caſes the party injured by the breach of a contract or agreement may have a remedy either by action at common law, or by recourſe to a court of equity: but here a general rule, it is ſaid, (*z*) muſt be obſerved, that if it appear from the matter of complaint that damages only can be recovered, in that caſe the remedy is at law, becauſe it is not the province of a court equity to aſcertain and award damages, but only to decree a ſpecific performance of the contract or agreement; and damages in general are only recoverable through the intervention of a jury.

But, wherever the agreement is to do ſomething in *ſpecie*, as to convey lands, execute a deed, &c., it is proper to apply to a court of equity for a ſpecific performance or execution of the thing contracted for, to which the party is entitled, if the agreement be good and ſufficiently proved; for in a court of law the party grieved can only recover damages for the breach of the contract or agreement.

The plaintiff has alſo, in ſome caſes, his *election* to bring one ſpecies of action or another for the ſame cauſe; as upon an expreſs or implied contract to pay money, he may have an action of *aſſumpſit* or *debt*. (*a*)

So, an action of *aſſumpſit* lies upon an expreſs promiſe to pay a debt due by ſpecialty upon a *new* conſideration; as in conſideration of forbearance; or in conſideration that he will ſhow the deed by which money appears to be due, &c. (*b*) But upon a mere promiſe made by a debtor to pay a bond, or other ſpecialty debt, without a *new* conſideration, this action lies not. (*c*)

(*y*) *Co. Lit.* 145. *a.* 1 *Danv. Abr.* 1. (*z*) *Bac. Abr* tit. *Agreement. B.* 1.
(*a*) 4 *Co.* 95. *See alſo* 1 *Rol. Abr.* 593. *l.* 10 *Com. Dig.* tit. *Action of Aſſumpſit*, C, *Debt*, A. 8. *Tidd's Prac.* 9, 10.
(*b*) *Com. Dig* tit *Action of Aſſumpſit*, (C.)
(*c*) 2 *Cro.* 598. *Mo.* 340. *Comp.* 128.

So,

So, where a man is accountable for money or goods, an action of *aſſumpſit* or *account* lies againſt him at the election of the plaintiff. (*d*)

A plaintiff may alſo ſometimes wave a *tort* or treſpaſs, and declare in *aſſumpſit* at his election.

Thus, in the caſe of *Lamine* v. *Dorrell*, (*e*) which was an action of *indebitatus aſſumpſit* for money had and received by the defendant to the uſe of the plaintiff as adminiſtrator of *J. S.* It appeared that *J. S.* died inteſtate poſſeſſed of certain *Iriſh* debentures; and the defendant pretending to a right to be adminiſtrator, procured a grant of adminiſtration to him, and by that means obtained the debentures into his hands and diſpoſed of them: but this adminiſtration being repealed, and a new adminiſtration granted to the plaintiff, he brought this action againſt the defendant for the money for which he ſold the debentures. It was objected, that this form of action would not lie; and that the plaintiff ought to have declared either in *trover* or *detinue* for the debentures. But the Court were of opinion, that the plaintiff might diſpenſe with the wrong, and ſuppoſe the ſale to have been made by his conſent, and bring an action of *aſſumpſit* for the money ariſing from the ſale, as money received to his uſe.

So, in the caſe of *Feltham* and others v. *Terry*, (*f*) where it appeared, that goods had been taken in execution, and ſold under a warrant of diſtreſs upon a conviction before juſtices of the peace, which was afterwards quaſhed; an action of *aſſumpſit* was thereupon brought to recover back the money ſo levied. It was objected that an action of *trover* or *treſpaſs* ought to have been brought, and not *aſſumpſit*. The Court held, that the party might wave the *tort*; which if he did, it was to his own prejudice, and in favour of the defendant: for, in this form of action, the plaintiff could only recover the ſum for which the goods were ſold; whereas in *treſpaſs* or *trover* he might recover damages far exceeding the amount of the ſum levied.

(*d*) 1 *Salk.* 9. *Carth.* 89, *Com. Dig.* tit. *Action*, M. 5 *Bul. N. P.* 147.
(*e*) 2 *Lord Raym.* 1216. *Sed vide* 2 *Bos. & Pul.* 555. 8 *Term. Rep.* 335.
(*f*) *Loft.* 208. *Cowp.* 419. *S. C.* 6 *Term Rep.* 695. *S. P.* *Sed vide* Lindon v. Hooper, *next page*.

So

So alſo, in caſes of bankruptcy, where goods, being in the poſſeſſion of the bankrupt, are wrongfully taken and ſold by creditors or others, the aſſignees may, in general, elect to bring *trover* or *aſſumpſit*. (*g*)

So, where it is declared, by act of parliament, that a plaintiff, in particular caſes, may ſue either by action of *debt* or on the *caſe*, he has his election to declare either in *debt*, *aſſumpſit*, or *tort*; although, by declaring in *tort*, the defendant may even be deprived of the benefit of a plea, or notice of ſet-off. (*h*)

So, if the breach of a ſimple contract conſiſt in *miſfeazance*, the plaintiff may declare in *aſſumpſit*, or in caſe for the *tort*, on the ſpecial circumſtances; as for *deceit* on the ſale of cattle or goods, or immoderate uſe of them, when lent or let to hire; and againſt attornies, agents, carriers, wharfingers, innkeepers, &c. (*i*)

But the plaintiff having once made his election, cannot afterwards bring another action for the ſame cauſe, either whilſt the former is depending, or after it has been determined. (*k*)

A breach of truſt committed by truſtees may ſometimes be the ground of an action of *aſſumpſit*, though the ordinary remedy againſt them is by bill in equity. Thus, where a truſtee applied truſt-money to the purpoſes of his trade, &c. it was held, that an action of *aſſumpſit* for money had and received would lie againſt him for the money ſo miſapplied. (*l*)

But an action of *aſſumpſit* will not lie to recover back money paid for the releaſe of cattle wrongfully diſtrained, the proper remedy being either by action of *replevin* or *treſpaſs vi et armis*.

Thus, in the caſe of *Lindon* v. *Hooper*, (*m*) which was an action of *aſſumpſit*, for money had and received, brought by the plaintiff, againſt the defendant, *Hooper*, who had diſtrained the plaintiff's cattle. The plaintiff inſiſted he had a right of common, and demanded his cattle to be reſtored, which the defendant refuſed to do, unleſs the plaintiff would pay him 20*s*. for the damage done. Upon this the plaintiff paid the money in diſpute for the releaſe

(*g*) 3 *Wils*. 304. *Loft*. 209. *Bul. N. P*. 131. *But ſee ante, vol*. 1. *p*. 455. *n. b*.

(*h*) *The* Huddersfield *Canal Company* v. Buckley, 7 *Term Rep*. 36.

(*i*) *Danv. Abr. tit. Actions*, 2 *Ld. Raym*. 909. 2 *Wils*. 319. 3 *Wils*. 348. *Cowp* 375. 1 *Term Rep*. 277. 6 *Eaſt Rep*. 333. *Bul. N. P*. 72. *Woodeſon's Lect. vol* 3 *p* 216. *Tidd's Prac*. 10.

(*k*) *Com. Dig. tit. Action* 1. *Abatement, H*. 24. 3 *Wils*. 304.

(*l*) Smith v. Jameſon, 5 *Term Rep*. 601. (*m*) *Cowp*. 414.

of

of his cattle; but the defendant agreed to return the money if the plaintiff ſhould make out his right. The action was brought for this money; and the queſtion for the opinion of the Court was, whether the plaintiff was entitled to recover back the money ſo paid, by this ſpecies of action? The Court were of opinion, that the plaintiff could not recover the money in this form of action; and Lord *Mansfield*, in delivering the opinion of the Court, ſaid, "The law has provided two preciſe remedies for the proprietor of cattle which happen to be impounded: 1ſt, he may replevy; and if he does, upon the avowry, he muſt ſpecially ſet out a right of common, or ſome other title, as a juſtification of the cattle being where they were taken. Or, 2dly, If he does not chuſe to replevy, but is deſirous to have his cattle immediately redelivered, he may make amends, and then bring an action of treſpaſs for taking his cattle; and particularly charge the money ſo paid, by way of amends, as an aggravation of the damage occaſioned by the treſpaſs. If to ſuch an action the diſtrainer pleads that he took them doing damage, the plaintiff muſt ſpecially reply the right or title which he alleges the cattle had to be in the *locus in quo*. If, inſtead of an action of treſpaſs, an action to recover back the money ſo paid by way of amends might be brought, at the election of the plaintiff, the defendant would be laid under a great difficulty: he might be ſurprized at the trial: he could not be prepared to make his defence: he could not tell what ſort of right of common, or other juſtification, the plaintiff might ſet up. The plaintiff might ſhift his preſcription as often as he pleaſed; or he might reſt upon objections to the regularity of the diſtreſs. The plaintiff can never be ſuffered to elect to throw ſuch a difficulty upon his adverſe party. Beſides, as applied to the ſubject matter of this queſtion, the action for money had and received could never anſwer the equitable end for which it was invented, and deſerves to be encouraged: for the point to be determined in this action is, whether the plaintiff's cattle treſpaſſed upon the defendant's land. That may depend on the plaintiff's or the defendant's right, or the fact of treſpaſſing: or it may depend on mere *form*. If the diſtreſs was irregular, the amends muſt be recovered back again. So that, allowing the owner of cattle to ſubſtitute this remedy, in lieu of an action of treſpaſs, would, as between the parties, be unequal and unjuſt, and, upon principles of policy, would produce inconvenience. It would break in upon that branch of common and ſtatute law which relates to diſtreſſes: it would

would create inconvenience by leaving rights of common open to repeated litigation, and depriving poſterity of the benefit of preciſe judgments upon record."

"There is a material diſtinction between this and the inſtances alluded to at the bar, where the plaintiff is allowed to wave the *treſpaſs*, and bring the action for money had and received. In *thoſe* inſtances, the relief is more favourable to the defendant. He is liable only to refund what he has actually received, contrary to conſcience and equity. In *this*, informalities in taking or treating the diſtreſs would avoid the amends, though the defendant had a right to diſtrain. But, which is more material, in thoſe inſtances the plaintiff, by electing this mode of action eaſes the defendant of *ſpecial pleading*, and takes the riſk of being ſurprized upon himſelf. In *this* he eaſes himſelf of the difficulty and preciſion of ſpecial pleading, and the burthen of the proof conſequent thereupon; and expoſes the defendant to uncertainty and ſurprize."

This Action does not lie upon an Undertaking by Deed, or upon Matter of Record.] An action of *aſſumpſit* will not lie upon a contract or agreement which is reduced into writing, under the hands and ſeals of the contracting parties; the only remedy at law being by action of *covenant* or *debt* upon the deed. (*n*)

Thus, if a man, for a good conſideration, promiſes by his deed not to do a certain thing, no action of *aſſumpſit* lies upon this promiſe, but a writ of *covenant*. (*o*)

So if *A.* recovers a debt againſt *B.*, and *B.* pays him the condemnation money, upon which *A.*, by deed, releaſes all actions, executions, &c. to *B.*, and by the ſame deed covenants that he will withdraw and diſcharge all writs of execution againſt *B.* upon the ſame judgment, and *A.* afterwards ſues execution againſt *B.* upon the judgment; yet no *action upon the caſe* in *aſſumpſit* lies upon this promiſe, becauſe it is made by deed; but *B.* ought to have a writ of covenant. (*p*)

So, in the caſe of *Bulſtrode* v. *Gilburn*, (*q*) in *aſſumpſit*, for money had and received, it appeared, that the plaintiff was prothonotary of the palace court, and the defendant his deputy; and that, by articles under ſeal, it was agreed what ſhare of the fees and pro-

(*n*) *Vide* Atty v. Pariſh, 1 *New Rep. C. B.* 104.
(*o*) 1 *Rol. Abr.* 11. *pl.* 20.
(*p*) 1 *Rol. Abr.* 517. *pl.* 3 *Cro. Jac.* 505, 6. (*q*) 2 *Stra.* 1027.

fits the defendant was to have; and he covenanted to account to the plaintiff for the reſidue, &c. After theſe articles were executed, an additional fee was created by act of parliament. The defendant received this, as well as the original fees, but refuſed to account for the additional fee. Lord *Hardwicke* held, that though the defendant ought to account for this fee, yet the plaintiff could not recover it *in this form of action*, he having a covenant under hand and ſeal, which gave him a remedy of a higher nature.

Wherever a perſon gives a ſecurity by way of indemnity for another, and pays the money, the law raiſes an *aſſumpſit*. But where he will not rely on the promiſe which the law will raiſe, but takes a bond as a ſecurity, there he has choſen his own remedy, and he cannot reſort to an action of *aſſumpſit*. (*r*)

But where a ſurety pays a debt, for which he joins another in a bond, he may maintain an action of *aſſumpſit* for it againſt the principal, it being money paid to his uſe, if there be no covenant by the principal to indemnify the ſurety. (*s*)

To make it neceſſary, however, for the plaintiff to ſue upon a deed, it muſt appear to have been executed by the defendant as well as the plaintiff.

Thus, in an action of *aſſumpſit* for ſeamens' wages, (*t*) brought againſt the captain, it appeared that the ſhip's articles between the owners and ſeamen were under ſeal, and that the plaintiff had ſigned and ſealed them; but they were not executed by the defendant. It was objected that the action was miſconceived, and ought to be in covenant: but Lord *Eldon*, Ch. J. ruled, that the defendant never having ſealed the articles, he could not be ſued in covenant; and that the action of *aſſumpſit* was rightly brought.

So, where a feme covert, without any authority from her huſband, contracts with a ſervant by deed, the ſervant having performed the ſervice ſtipulated, may maintain an action of *aſſumpſit* againſt the huſband: for as the covenant by the wife cannot bind the huſband, ſhe having no authority to bind him by deed, no action of covenant will lie: but *aſſumpſit* is the proper form of action. (*u*)

(*r*) Touſaint *v.* Martinnant, 2 *Term Rep.* 100.

(*s*) Decker & *ux v.* Pope, *coram Ld. Mansfield, ſitt Trin.* 1757. *Eſp. N. P.* 96. (*t*) Sutherland *v.* Liſhman, 3 *Eſp. Rep.* 42.

(*u*) White *v.* Cuyler, 6 *Term Rep.* 176.

So,

So, where the *whole* cauſe of action does not ariſe from the deed, and there is no covenant applicable to the demand, *aſſumpſit* will lie.

Thus, where two enter into articles of co-partnerſhip by deed, and covenant to adjuſt and ſettle their accounts at certain times; and the parties, in purſuance thereof, come to a ſettlement, and the balance is ſtruck and agreed upon, the party to whom the balance is due may maintain an action of *aſſumpſit* againſt his co-partner, notwithſtanding the deed. (*v*)

So, if an agreement be made by deed to let and grant a leaſe of a houſe, and the leſſee enter and occupy the houſe, the leſſor may maintain an action of *aſſumpſit* for uſe and occupation: for ſuch an agreement does not amount to a leaſe, but only an agreement for a leaſe. (*w*)

A promiſe to pay a judgment debt and the coſts, in conſideration that the plaintiff would ſtay execution, is no ground to raiſe an *aſſumpſit*. (*x*)

This Action does not lie for Money which has been the Subject of a Set-off in a former Action.] No action will lie for money which has been pleaded by way of ſet-off, and diſpoſed of in a former action: but where the amount of the ſet-off exceeded the plaintiff's demand in the former action, the ſurplus may be recovered in a ſecond action.

Thus, in the caſe of *Hennell* v. *Fairlamb*, (*y*) which was an action of *aſſumpſit* for work and labour, it appeared that the defendant had brought an action againſt the preſent plaintiff, to which the latter had pleaded a ſet-off, and had obtained a verdict. The demand in the former action was 7*l.* 2*s.*; the ſet-off was 14*l.* 15*s.*

Lord *Kenyon* ruled, that as the 7*l.* 2*s.* was the object of the ſet-off in the former action, and had been diſpoſed of by the verdict obtained therein for the plaintiff, he could only recover the difference between 7*l.* 2*s.* and 14*l.* 15*s.*

(*v*) Moravia *v* Levy, *Sitt. after Mich.* 1786. *cor. Buller*, J. 2 *Term Rep.* 483. *n. a.* Foſter *v.* Allanſon, *ib.* 479.

(*w*) Elliott *v.* Rogers, *Maidſtone ſummer aſſizes*, 1801. *cor. Ld. Kenyon*, 4 *Eſp. Rep.* 59. (*x*) *Cowp.* 128.

(*y*) *Eſp. Rep.* 104.

3. *By and Against Whom this Action may be brought.*

The action of *assumpsit* may be brought by him to whom the promise was made, though the benefit accrues to another: (*a*) as, if *A.* promise *B.* to give money to his daughter when she marries, *B.* may bring the action in his own name. (*b*)

So, the executor or administrator of him to whom the promise was made, may have the action, though the benefit accrues to another. (*c*)

So, if the party becomes bankrupt, or is discharged under an insolvent debtors' act the assignees may bring the action: but upon the contract or promise of a bankrupt or insolvent debtor, an action at law does not lie against his assignees. (*d*)

The action may be brought by him likewise to whom the benefit is: as if a promise be to a *feme covert*, the husband alone may have the action and declare upon a promise made to himself: or the husband and wife may join, at the election of the husband. (*e*).

So, upon a promise to the father to give so much with his daughter in marriage, the daughter may have the action: for she is the meritorious cause.

Thus, in the case of *Dutton* v. *Poole*, (*f*) the plaintiff declared, that his wife's father being seised of land now descended to the defendant, and being about to cut down 1000*l.* worth of timber for his daughter's portion, the defendant promised the father, in consideration that he would forbear to fell the timber, that he would pay the plaintiff, the daughter, 1000*l.* After verdict for the plaintiff, upon *non-assumpsit*, it was moved in arrest of judgment, that the action would not lie for the daughter, but ought to have been brought by the executors of the father. But the Court said, it might have been another case, if the money had been to be

(*a*) *Vide Cro. El.* 807. *Hard.* 321.

(*b*) 1 *Roll. Abr.* 30. *l.* 44. 31. *l.* 15. *Yel.* 1, 2. *Cro. El.* 807. *Hard.* 321. *But see Mo.* 550. *Cro. El.* 619. 652. *contra.*

(*c*) *Al.* 1. 1 *Rol. Abr.* 31. *l.* 20. *Jon* 415. *Et. vide ante, vol.* 1. *part* 2. *chap.* 11. *f.* 1. (*d*) *Ante. vol.* 1. *p.* 192.

(*e*) *Com. Dig.* tit. *Action upon Assumpsit, E. See also* 1 *Bos. & Pul.* 101. *n. c.* 3 *Bos. & Pul.* 149. *n. a.*

(*f*) 1 *Vent.* 318. 332. *T. Jones*, 102. 2 *Lev.* 211. *See also* 1 *Rol. Abr.* 30. *l.* 44. 31. *l.* 15. 1 *Vent.* 6. *Al.* 1. *Cro. El.* 164. *Bul. N. P.* 133.

paid

paid to a ſtranger; but it is a kind of debt to the child to be provided for, and therefore affirmed the judgment.

In the caſe of *Crow* v. *Rogers*, (*g*) however, where the plaintiff declared that one *John Hardy* was indebted to the plaintiff in 70*l.* upon a diſcourſe between *Hardy* and the defendant, it was agreed that the defendant ſhould pay the plaintiff's debt of 70*l*, and that *Hardy* ſhould make the defendant a title to a houſe. Then he avers, that *Hardy* was always ready to perform his part of the agreement, and that the defendant, in conſideration thereof, promiſed to pay the plaintiff.

The defendant demurred; and it was inſiſted, that there was no conſideration moving from the plaintiff to ſupport this promiſe. And the Court held that the plaintiff was a ſtranger to the conſideration; and accordingly gave judgment for the defendant.

So, in the caſe of *Pine* v. *Morris*, (*h*) where a ſon promiſed his father, that, in conſideration that he would ſurrender a copyhold to him, that he would pay a certain ſum to his ſiſter, and for which ſhe brought the action; it was holden, that it would lie for none but the father; and the reaſon given is, *that where the party to whom the promiſe is to be performed, is not concerned in the meritorious cauſe of it, he cannot bring the action.*

But in *Bourne* v. *Maſon*, (*i*) where the plaintiff declared, that whereas *P.* was indebted to the plaintiff and defendant in two ſeveral ſums of money, and that a ſtranger was indebted to *P.*, the defendant, in conſideration that *P.* would permit him to ſue the ſtranger in his name, promiſed to pay the ſum *P.* owed the plaintiff, and alleged that *P.* permitted, and he recovered. After verdict for the plaintiff, judgment was arreſted, becauſe the plaintiff was a mere ſtranger to the conſideration: but a caſe being then cited of a promiſe made to a phyſician, that if he did ſuch a cure he would give him ſuch a ſum of money to himſelf, and another to his daughter, in which it was reſolved, the daughter might bring an *aſſumpſit* for the money, the Court agreed to it, and ſaid the nearneſs of the relation gave the daughter the benefit of the conſideration performed by her father.

(*g*) *Stra.* 592. (*h*) *Cited in T. Jon.* 103.
(*i*) 1 *Vent.* 6. *Vide Bul. N. P.* 134.

So, if money be given to *A.* to deliver to *B.*, *B.* may have the action. (*k*)

So, if a man promiſe my ſervant or attorney to pay upon forbearance, to which I afterwards agree, I may have the action. (*l*)

So, in the caſe of *Banfield* v. *Leigh*, (*m*) where *A.* and *B.*, in 1797, aſſigned to the plaintiff all debts due to them, and gave him a power of attorney to receive and compound for the ſame, under which the plaintiff, in 1799, ſubmitted to arbitration the matters in difference, then ſubſiſting between his principals and the defendants; and the plaintiff and defendants promiſed to each other to perform the award. The arbitrators having awarded a ſum to be paid to the plaintiff as ſuch attorney, he may maintain an action for it in his own name.

But in the caſe of *Piggott* v. *Thompſon*, (*n*) where the commiſſioners of certain tolls had let them to the defendant, under the following agreement: "*June* 23d, 1798. I do hereby acknowledge "to have hired the above tolls for three years, by private contract, "at 145*l. per annum*, to be paid to the treaſurer of the commiſ- "ſioners, at his houſe in *Ely*, by twelve equal monthly payments "in each year; the firſt payment to begin and be made on the "24th day of *July* next, as witneſs my hand. *John Thompſon.*"

The Court determined, that no action thereon, for arrears of rent, could be maintained in the name of the treaſurer, but that the action muſt be brought in the name of the commiſſioners.

So, the aſſignee of a *choſe in action* (*o*) cannot ſue in his own name; but muſt ſue in the name of the aſſignor; for by the ſtrict rules of the ancient common law, no *choſe in action* could be aſſigned or granted over, becauſe it was thought to be a great encouragement to litigiouſneſs if a man were allowed to make over to a ſtranger his right of going to law. But this nicety

(*k*) 1 *Rol.* 7. *l.* 10. 32. *l.* 30. *Hard.* 321. *See alſo* 1 *Bos. & Pul.* 101, *a. c.* 3 *Bos. and Pul.* 149. *n. a.*

(*l*) *Vide Com Dig.* tit. *Action upon Aſſumpſit*, E.

(*m*) 8 *Term Rep.* 571. (*n*) 3 *Bos & Pul.* 147.

(*o*) *A contract conveys either a choſe, i. e property in poſſeſſion, or in action only For inſtance if A. agrees to change horſe with B., and they do it immediately; in which caſe the poſſeſſion and the right are tranſferred together, and is therefore called a choſe in poſſeſſion: but if they are to change horſes next week, here the right only veſts, and their reciprocal property in each other's horſe is not in poſſeſſion, but in action; and is therefore denominated a choſe in action.* 2 *Bl. com.* 443.

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is now diſregarded; though, in compliance with the ancient principle, the form of aſſigning a *choſe* in action is in the nature of a declaration of truſt, and an agreement to permit the aſſignee to make uſe of the name of the aſſignor, in order to recover the poſſeſſion. And therefore when, in common acceptation, a debt or bond is ſaid to be aſſigned over, it muſt ſtill be ſued in the original creditor's name; the perſon to whom it is transferred being rather an attorney than an aſſignee. But the king is an exception to this general rule: for he might always either grant or receive a *choſe* in action by aſſignment; and our courts of equity, conſidering that in a commercial country almoſt all perſonal property muſt neceſſarily lie in contract, will protect an aſſignment of a *choſe in action*, as much as the law will that of a *choſe in poſſeſſion*. (*p*)

Where there are *ſeveral* parties to a contract, the action ſhould be brought by or againſt all of them, if living; or if ſome are dead, by or againſt the ſurvivors: and an action may be brought by or againſt a ſurviving partner, for his own debt, as well as for that which was contracted in the life-time of the deceaſed. If an action be brought upon a joint contract, by one of the ſeveral partners, the plaintiff will be nonſuited, or have a verdict againſt him: but if it be brought againſt one of ſeveral partners, he can only plead in abatement; though the plaintiff knew, and even contracted with the other partners. (*q*)

Where a promiſe was made upon an account ſtated with the principal of an inn of court, (*r*) of monies due to him and the ſeniors of the ſociety, it was held, that the action muſt be brought in the joint names of the principal and ſeniors, and cannot be maintained in the name of the principal only.

So, if a promiſe is made in conſideration of 10*l.* given by *A.* and *B.* to return the beaſts of *A.* and the beaſts of *B.*, they ſhall join, though their property was ſeveral; for the promiſe was to them jointly. (*s*) But where a promiſe is made to *A.* to deliver goods to *B.* they cannot both join. (*t*)

Where two ſeveral tenants of a farm agreed with the ſucceeding tenant to refer certain matters in difference reſpecting the

(*p*) 2 *Bl. com.* 442. (*q*) *Vide Tidd's Prac.* 8.
(*r*) *The Principal of Furnivals Inn* v. *Hardeſty*, 7 *Mod.* 116.
(*s*) 1 *Rol. Abr.* 31. *l.* 40. (*t*) *Hard.* 321.

farm to arbitration, and jointly and ſeverally promiſed to perform the award; the arbitrator awarded each of the two to pay a certain ſum to the third; it was held that they were jointly reſponſible for the ſum awarded to be paid by each. (*u*)

The heir of him to whom a promiſe is made cannot maintain an action thereon: for it can only be brought by the executor or adminiſtrator. (*v*)

4. *At what Time this Action lies upon a Contract to pay Money, or do ſome other Acts at ſeveral Days; and within what Time it muſt be brought by the Statute of Limitations.*

If a man contract to do a thing at ſeveral times, an action of *aſſumpſit* lies upon every default. As, upon a bargain to deliver twenty *quarters of wheat* every year during the life of the bargainor, an action of *aſſumpſit* lies for default at the firſt year. (*w*)

So, upon a contract to pay money at *ſeveral days* an action of *aſſumpſit* lies for non-payment after the firſt day. (*x*) As, upon an agreement to pay 4*l.* at 5*s. per month*, an action lies upon every default. (*y*)

So, upon an agreement to pay 100*l.* upon a marriage, *viz.*, 20*l.* at ſuch a day, and 20*l.*, &c., an action lies after each day. (*z*)

Thus, in the caſe of *Cooke* v. *Whorwood*, (*a*) which was an action of *aſſumpſit* upon an award, which directed, amongſt other things, that the defendant ſhould pay to the plaintiff ſeveral ſums of money at *ſeveral days*. It was objected that the action could not be maintained, becauſe all the days of payment were not paſt. But the Court determined, "that the action might be brought for ſuch ſum of money only as was due at the time of bringing the action, and that the plaintiff ſhould recover damages accordingly: they alſo ſaid, "that when another ſum of the mo-

(*u*) Manſell v. Burredge, 7 *Term Rep.* 352.
(*v*) *Vide Com. Dig.* tit. *Action upon Aſſumpſit*, (E). *Et vide ante Vol.* 2. *Part* 2. *Chap.* 11. *ſ.* 1. (*w*) 4 *Co.* 49. *b. Dy.* 113. *a.*
(*x*) *Co. Lit.* 29. *But ſee* 3 *Leon.* 4. *contra.* (*y*) *Cro. Jac.* 504.
(*z*) *Vide* 1 *Rol. Abr.* 29. *l.* 20. 35. *Cro. El.* 118. 776. 807. *Mo.* 13.
(*a*) 2 *Saund.* 337.

they awarded ſhould become due, the plaintiff might commence a new action for that alſo, and ſo *toties quoties*."

So, if *A.* in conſideration that *B.* had bargained and ſold to him certain tons of ſtrong beer, promiſed to pay 4*l.* for every ton, *ſuper deliberationem inde* of thirty tons of ſtrong beer; an action lies upon this promiſe for ſo many tons as he delivers before the delivery of all the thirty tons. (*b*)

So, if there be a contract to deliver ſo much corn before *Michaelmas* for ſo much the comb, to be paid at the delivery of the laſt corn, and he delivers only part of the corn; yet an *indebitatus aſſumpſit* lies for ſo much after *Michaelmas*; for though the agreement was entire the ſeveral delivery makes ſeveral contracts, and the defendant has a remedy for the reſidue. (*c*)

But, in the caſe of *Waddington* v. *Oliver*, (*d*) which was an action of *aſſumpſit* for goods ſold and delivered, where it appeared, that on the 10th of *September*, 1804, the plaintiff agreed with the defendant to ſell him one hundred bags of *Kent* hops merchantable, of the growth of 1804, at 56*s.* *per* hundred weight, to be delivered on or before the 1ſt of *January*, 1805, as it might be anſwerable to the plaintiff. That on the 12th of *December*, twelve bags were delivered, and on the ſame day, or the next, payment thereof was demanded, which being refuſed, the writ was ſued out on the 13th of *December*.

It was contended, that as the plaintiff was at liberty to deliver the hops at ſuch times as he pleaſed before the firſt of *January*, and no time was ſtipulated for payment, the defendant was bound to pay for them as they were delivered. The Court, however, were clearly of opinion, "that the contract was entire and could not be ſplit; and that the plaintiff therefore had no right to bring an action until the whole quantity was delivered, or until the time for delivering the whole had arrived." (*e*)

Upon an agreement to pay 15*l.* yearly for four years, if *A.* enjoys ſuch land, an action of *aſſumpſit* lies for each year that *A.* enjoys, before all the years are incurred. (*f*)

(*b*) 1 *Rol. Abr.* 29. *l.* 30.
(*c*) *Per* Hale, *at* Norfolk *Aſſ.* 1662. *between* Baker v. Sutton, *Com. Dig.* tit. *Action.* (F.) (*d*) 2 *New Rep. C. B.* 61.
(*e*) *Note, neither of the two preceding caſes were adverted to in this caſe.*
(*f*) *Cro. El.* 118. 1 *Rol. Abr.* 30. *l.* 5. *Owen*, 42.

So,

So, a promiſe to pay rent annually at *Michaelmas* and *Lady-day*, *aſſumpſit* lies after each feaſt. (*g*)

But if a promiſe be to pay for an houſe 30*s.* *annually*, without more, an action does not lie for 45*s.* for a year and a half; for it is payable annually. (*h*)

Where a bill or note is payable by inſtalments, and it contains a clauſe that on failure of payment of any one inſtalment, the whole ſhall become due, the holder is entitled to recover the whole amount of the ſum for which it was given, upon any one default; but where the inſtrument does not contain ſuch a clauſe, it is doubtful on the authorities, whether the holder can legally take a verdict for more than the inſtalment due. (*i*) According to the caſe of *Beckworth* v. *Nott*, (*k*) and ſeveral other caſes cited by Lord *Loughborough*, in giving the opinion of the Court in the caſe of *Rudder* v. *Price*, (*l*) the plaintiff is entitled to the whole ſum for which the note was given; but according to other caſes, and particularly that of *Aſhford* v. *Hand*, (*m*) the plaintiff is only entitled to the inſtalments due at the time of commencing the action.

Indeed, it is ſaid, (*n*) in the caſe of a contract to pay money, or do a thing at ſeveral days, if the jury give the entire ſum in damages, with an averment that it was for the whole, it will be a bar to another action upon the ſame promiſe.

If, however, the plaintiff takes a verdict for more than he is entitled to recover, the court will either compel him to correct the verdict, and pay the coſts occaſioned by his miſconduct, or grant a new trial. (*o*)

Where money is payable *upon requeſt*, this diſtinction is taken: If the promiſe be made to pay a collateral ſum *on requeſt*, *i. e.*, 40*l.* *if the defendant does not perform an award*, &c.; here the requeſt is parcel of the contract, and muſt be proved, and no action ariſes until a requeſt be made. But where a mere duty is promiſed to be performed upon requeſt; as if the defendant, in conſideration of money lent to him, promiſes to repay it upon requeſt, no actual requeſt is neceſſary, but the bringing of the action is a ſufficient requeſt. (*p*)

(*g*) 2 *Lev.* 107. 4 *Leon.* 13. *Allen*, 30. (*h*) *Litt. Rep.* 61.
(*i*) *Vide Chitty on Bills*, 294. *laſt ed.* (*k*) *Cro. Jac.* 505. *Jenk.* 333.
(*l*) 1 *H. Bl.* 551. (*m*) *Andr.* 270. (*n*) *Vide Cro. Jac.* 505.
(*o*) 1 *H. Bl.* 88. *Cowp.* 574, 5. *Bailey on Bills*, 90. *Chitty on Bills*, 295. *laſt ed.* *But ſee* 2 *Wils.* 262. (*p*) 2 *Saund.* 32, 33. *and note* 2.

Where

Where a creditor, upon a ſettlement of accounts between him and his debtor, agrees to take part of the balance found to be due to him, in ready money, and a ſecurity for the remainder, payable in a month; and the money is paid, and the ſecurity given accordingly, no action will lie till the expiration of the month, though the ſecurity happened by miſtake to be invalid by having been given on a wrong ſtamp.

Thus, in the caſe of *Swears* v. *Wells*, (*q*) which was an action of *aſſumpſit* to recover a ſum of money due to the plaintiff upon an accounted ſtated. At the trial it was proved, that on a ſettlement of accounts between the plaintiff and defendant, a balance of 8*l.* was found to be due to the plaintiff. The defendant being unable to pay the whole of that ſum had applied to the plaintiff to take half the money down, and the remainder in a month; to which he conſented. He then proved, that he had left for the plaintiff a check on a banker for 4*l.*, and the defendant's promiſſory note for the remaining 4*l.* payable in a month; but this laſt appeared to have been on a wrong ſtamp. The plaintiff took the check for 4*l.*; and received the money, and now brought his action to recover the remainder before the expiration of the month.

Lord *Kenyon*, Ch. J. ſaid: "That the whole agreement for payment of the money muſt be taken together. Under it, the plaintiff had agreed to accept part in hand and the remainder in a month. This was an entire contract; and if the plaintiff had been inclined to have receded from it he ſhould have reſcinded the whole, but he had affirmed it by receiving part in money under the check, and now attempted to evade the latter part of the agreement, by which the defendant was allowed a month's time to pay the remainder; that although the note was given on a wrong ſtamp, that did not alter the nature of the agreement, as he ſhould either have applied for another promiſſory note, or have waited till the month was expired, and having therefore brought his action before the month, he muſt be nonſuited."

Of the Statute of Limitations.] By the ſtatute 21 *Jac.* 1. *c.* 16. *ſ.* 3. it is enacted, "that all actions of *account*, and upon the

(*q*) 1 *Eſp. Rep.* 317.

caſe, * other than ſuch accounts as concern the trade of merchandize between merchant and merchant, their factors or ſervants, ſhall be commenced and ſued within *ſix* years *next* after the cauſe of ſuch action or ſuit, and not after.

"Nevertheleſs, if in any of the ſaid actions, judgment be given for the plaintiff, and the ſame be reverſed by error; or a verdict paſs for the plaintiff, and upon matter alleged in arreſt of judgment, the judgment be given againſt the plaintiff, that he take nothing by his plaint, writ, or bill; or if any of the ſaid actions ſhall be brought by original, and the defendant therein be outlawed, and ſhall after reverſe the outlawry; that in all ſuch caſes the party, plaintiff, his heirs, executors or adminiſtrators, as the caſe ſhall require, may commence a new action, within a year after ſuch judgment reverſed or given againſt the plaintiff, or outlawry reverſed, and not after.

"And if any perſon or perſons, entitled to any of the ſaid actions, ſhall be at the time of any ſuch cauſe of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, impriſoned, or beyond the ſeas; then ſuch perſon or perſons ſhall be at liberty to bring the ſame actions, within ſuch times as are before limited, after their coming to, or being of full age, diſcovert, or of ſane memory, at large, and returned from beyond the ſeas."

Upon this ſtatute it was formerly doubted whether the exception of accounts concerning the trade of merchandize between merchant and merchant extended to actions upon the *caſe*, as well as to actions of *account*; but it is now clearly ſettled that it extends to both. (*r*)

* *We have before ſeen that an action of aſſumpſit is properly an action upon the caſe, vide ante*, *p.* 549.

(*r*) *Vide* 2 *Saund.* 124, 5.

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14. So, if goods are consigned by a bankrupt, previous to his bankruptcy, to a factor, who is fully acquainted with his insolvency; and, upon such consignment, money is advanced by the factor, this is not a fraudulent consignment, and the factor is entitled, (as against the assignees) to retain the produce of the goods, in satisfaction of his general balance i—472

See also PRINCIPAL, FACTOR AND AGENT.

15. Bankers are liable for money paid upon the drafts of a bankrupt, out of cash in their hands, belonging to the bankrupt, after notice of his bankruptcy. But the assignees having recovered such money from the bankers, cannot recover the same sum from the creditor, though he received it after notice of the bankruptcy i—485

16. If a policy-broker pays a sum of money of his own, on account of his principal (a bankrupt) to a trader, who held certain policies of assurance of the bankrupt, which had been delivered to him after a secret act of bankruptcy, in satisfaction of a joint debt, he may retain the amount of such sum so paid i—486

17. India stock re-transferred by a trader, after an act of bankruptcy, to a person who entrusted him with it for the purpose of voting, may be recovered back by the assignees; though not in an action of *indebitatus assumpsit* for money had and received i—489

18. In the case of mutual credit between a bankrupt and another person, one debt may be set off against the other, notwithstanding any prior act of bankruptcy before such debt was contracted i—435

19. No commission shall be avoided, by reason of a prior act of bankruptcy existing before the petitioning creditor's debt accrued, provided the petitioning creditor had no notice of such prior act of bankruptcy i—436.

BASTARD CHILDREN.

See NECESSARIES.

1. The stat. 6 *Geo.* 2 c. 31. only authorizes parish officers to take security from the putative father of a bastard child, to *indemnify* the parish; and therefore a promissory note given in a certain sum and payable absolutely, is void i—400

BILLS OF EXCHANGE.

See STAMPS—MONEY HAD AND RECEIVED.

1. A bill or note without consideration is void, as between the immediate

mediate parties, but not as againſt third perſons i—12, 13

2. Mutual acceptances is a good conſideration for an *aſſumpſit* i—14

3. A bill of exchange or promiſſory note given upon an uſurious conſideration, is void, even in the hands of a *bonâ fide* indorſee i—41

4. But if a bill is given upon a *bonâ fide* conſideration, uſury in the courſe of any intermediate indorſements, will not avoid it in the hands of a *bonâ fide* indorſee i—41

5. A bill of exchange given for money won or lent at play, is void i—42

6. A bill of exchange given by a principal to his broker for the amount of differences paid on ſtock-jobbing tranſactions, is alſo void, even in the hands of an indorſee i—43

7. A mere promiſe by a debtor to his creditor, that if he would draw a bill upon him for the amount of his demand, he would pay it, does not amount to an acceptance of the bill when drawn ii—16

IN WHAT CASES MONEY PAID ON ACCOMMODATION BILLS IS RECOVERABLE, *See* MONEY PAID.

BOND.

See SCOTCH BOND.

BUILDER.

See CARPENTER AND BUILDER.

C.

CARPENTER AND BUILDER.

1. Where a carpenter or builder enters into a ſpecific contract to erect a building for a certain ſum of money, but additions and alterations are afterwards made, he his bound by the contract, as far as it can be traced to have been followed, and entitled only to recover the exceſs according to the uſual rate of charging ii—360

2. So, in an action by a carpenter upon a *quantum meruit* for work and labour done, and materials found, it is competent to the defendant, even without notice to the plaintiff, to prove that the work is improperly executed, and that it is not worth ſo much as the plaintiff claims ii—361, &c.—372—384

3. If a man promiſe to build a mill or houſe for another, within a certain time, but fails in doing it, no action lies upon this promiſe, unleſs there be a conſideration alleged for the doing it ii—365

CATTLE.

See SALES — WARRANTY — BAILMENT.

CARRIER.

See BAILMENT.

OF COMMON CARRIERS BY LAND.

1. A common carrier for hire is reſponſible for the loſs or damage of goods entruſted to his care for ſafe delivery, in all caſes, except where it happens from the act of *God*, or of the King's enemies ii—291

2. Therefore, though a carrier be robbed of the goods delivered to him, he ſhall anſwer for their value ii—291

3. So a carrier is conſidered in the nature of an inſurer, and is liable for the loſs of goods occaſioned by fire happening without any negligence or fault in him or his ſervants ii—291

4. But where a common carrier between *A.* and *B.* was employed to carry goods from *A.* to *B.*, to be forwarded to *C.*, and the goods were ſafely delivered at *B*, and there put into his warehouſe until they could be delivered to another carrier from *B.* to *C.*; but whilſt they remained in the warehouſe they were deſtroyed by an accidental fire; it was held that the carrier was to be conſidered merely as a warehouſeman, and therefore not reſponſible for the loſs ii 292, 3

5. Though a man travel in a ſtage-coach, and take his portmanteau with him, yet the carrier is liable if it be loſt ii—294

6 All perſons carrying goods for hire, as maſters and owners of ſhips, and other veſſels, lightermen, proprietors of waggons, &c., come under the denomination of common carriers ii—294

7. So if a proprietor of a ſtage-coach carries goods as well as paſſengers for hire, he ſhall be deemed a common carrier ii—294

8. But a hackney coachman is not a common carrier ii—294

9. So the poſtmaſter-general does not come under the denomination of a common carrier ii—294

10. Leaving goods in an inn-yard from whence a carrier ſets out, is no delivery to the carrier ii—295

11. But if goods are delivered to a carrier's ſervant or agent whom he appoints to receive goods for him, this is a ſufficient delivery to and acceptance by the carrier ii—295

12. A common carrier who accepts a box with goods and money in it, is liable to the full extent of the loſs or damage happening to them, though he be ignorant of its contents, unleſs he make a ſpecial acceptance ii—295, 297

13. But if the carrier aſks if there be money in the box, and the owner ſays no, or if he accepts it conditionally, provided there be no money in it, or not above a certain ſum, in either of theſe caſes the carrier is diſcharged, in caſe the box be loſt, if the repreſentation be untrue ii—296,7

14. To prevent, however, the general liability of carriers, it is now uſual for them to ſtick up a notice in ſome notorious part of their offices, that they will not be anſwerable for goods of above a certain value, unleſs booked and paid for accordingly; ſo that if goods of above the value ſpecified in the notice are ſent without being booked and paid for according to their value, the carrier is not liable in caſe of loſs or damage ii—298 to 303

15. If a common carrier uſually keeps a porter, by whom he ſends out the goods to the perſons to whom they are directed, and receives porterage for the ſame, he is bound to deliver them ſafely to the houſe of the conſignee ii—303 to 312

16. But for the more ſpeedy delivery of goods brought by common carriers to inns and warehouſes within the cities of *London* and *Weſtminſter*, and borough of *Southwark*, *and the ſuburbs and liberties thereof* reſpectively, ſee the ſtat. 39 *Geo.* 3. *c.* 58. which has regulated the time of delivery and rate of charge, &c. ii—313

17. In caſe of loſs or damage of goods, it appears, that if the conſignor is to pay for the carriage of them, and cannot charge the conſignee therewith, the action ſhould be brought in his name: but if the conſignee orders the goods to be ſent by a particular carrier, to whom they are delivered; or if he be liable in the ordinary courſe of trade to pay for the goods upon delivery to the carrier, the action muſt be brought in his name ii—315 to 319

18. The action may be brought either againſt the proprietors or their ſervant; but if it be brought againſt the former all of them ſhould be ſued ii—315

19. And the form of action may be either on the caſe in *tort* or *aſſumpſit*, but a carrier cannot be charged in *trover*, unleſs there be a tortious converſion. He is, however, ſubject to ſuch an action where he delivers goods to a wrong perſon, though it happens by miſtake ii—319

20. The maſter of a ſtage-coach which carries paſſenger only is not anſwerable for the loſs of goods belonging to a paſſenger; the ſervant alone is liable ii—315

21. A com-

22. A common carrier may retain the goods delivered to him until he his paid for the carriage of them ii—319

23. Or he may bring an action of *assumpsit* for the amount thereof ii—315

23. So by general usage a common carrier has a lien on goods for his general balance, but such lien does not in any case affect the right of the consignor to stop the goods in *transitu* ii—320

1. Of Private Carriers by Land, either with or without Reward—*See* Bailment.

2. Of Common Carriers by Water.

1. Owners and masters of general ships or vessels carrying goods for hire are considered as common carriers, and are answerable against all events, except the act of *God*, and the King's enemies ii—320.

2. Therefore where goods were spoiled by reason of the rats having made a leak in the keel of a hoy, the carrier was held liable for the damage ii—321

3. So if a ship is accidentally driven against a bank at the entrance of a harbour, by means of which goods are spoiled, no evidence is admissible to show that there had been no actual negligence of the master and mariners ii—323

4. So a carrier by water impliedly promises that his vessel shall be tight and fit for the voyage; he is therefore answerable for any damage done to goods occasioned by leakage, although he gives notice that he will not be answerable for any damage, unless occasioned by want of ordinary care in the master or crew of the vessel ii—321 n. (*p*)

5. In what cases the owner and master are liable upon an acceptance under a bill of lading ii—323 to 326

6. If corn is delivered to a servant of a common carrier, and put on board his boat, under particular circumstances, in order to prevent its being seized by a mob, the master is not answerable as a common carrier; the owner not having informed him or his servant of those circumstances ii—326

7. In a declaration against a lighterman in the common form for negligence, the plaintiff cannot recover, if it appear that the loss was not occasioned by a neglect of the common and ordinary duty of the defendant ii—327

8. If a common carrier from *A.* to *C.* receives goods for delivery at *B.*, an intermediate place, at which he safely arrives, but omits to deliver the goods; and the vessel and goods, in their passage to *C.*, are unavoidable lost; he is liable for the value of the goods, even though he accepts them under a particular notice which limits his responsibility to the want of ordinary care ii—328

9. As soon as the master accepts the goods on board the ship, his and the owner's responsibility commence; but the period when it ceases depend upon the custom of particular places, and the usage of trade ii—329, 30

10. But a common carrier is not responsible where the servant of the consignee or owner is sent with the goods for the purpose of protecting them ii—330

11. In the case of fire happening on board a ship, the owners are wholly exempt by the stat. 26 *Geo.* 3. *c.* 86. *s.* 2. from making good any loss or damage happening to goods by reason thereof ii—331

12. And, by the 3d section of the same statute, no master or owner is liable to make good any loss which may happen to any gold, silver, jewels, &c. by reason of any robbery or embezzlement, unless the owner of the goods shall insert in the bill of lading the true nature, quality and value of such gold, &c. ii—331

13. And by 7 *Geo.* 2. *c* 15. no owner ſhall be liable to make good any loſs which may happen to any gold, &c. by reaſon of any embezzlement committed by the maſter or mariners, without the knowledge or privity of the owner, further than the value of the ſhip and freight ii—332, &c.

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1. What certainty is neceſſary in expreſs promiſes i—

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See BANKRUPT.

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See SCOTCH BOND.

1. The definition of a choſe in action ii—566. n. (*o*)
2. The aſſignee of a choſe in action cannot ſue in his own name, but muſt ſue in the name of the aſſignor ii—566

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1. Churchwardens *de facto* may maintain an action againſt former churchwardens for money received by them to the uſe of the pariſh i—395
2. Churchwardens when choſen are a corporation, and, as ſuch, are competent to enter inter into a reaſonable contract and agreement beneficial for the pariſh i—396

CLERGYMEN.

1. An agreement with a vicar to pay him ſo much *per annum* for preaching, is valid ii—389
2. So if a rector give a perſon a title to the biſhop, by which the rector appoints him curate of his pariſh church, and alſo thereby undertakes to continue him, and pay him a ſalary, he cannot remove him without cauſe; and the curate may recover his ſtipend from the rector by action of *aſſumpſit* upon the title ii—389

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See NECESSARIES.

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1. Contracts entered into with a view to future cohabitation and proſtitution, are illegal and void i—31
2. But an engagament or promiſe by way of reparation for paſt ſeduction is valid i—32

COMMISSIONERS TO EXAMINE WITNESSES.

1. If one be named a commiſſioner to examine witneſſes, he may bring an action of *aſſumpſit* to recover a reaſonable compenſation ii—388

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See CARRIER.

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CONCEALMENT.

1. Fraudulent concealment of material circumſtances will vitiate a contract i—38

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See CONTRACT — ILLEGAL CONTRACT.

1. A valuable conſideration is neceſſary to ſupport a contract, whether it be in writing or merely verbal i—8, 9, 13
2. The different ſpecies of conſideration as divided by the *Civilians* i—8
3. The conſideration muſt be ſomething lawful, otherwiſe the promiſe is void i—31
4. Bills and notes as between the immediate parties thereto, are void without a conſideration, but not as againſt third perſons who are ſtrangers to the want of conſideration between them i—12

5. What

5. What consideration will support a contract or promise; and of mutual promises i—13 to 19
6. Of a past or executed consideration i—19 to 23
7. Of a consideration executed in part only i—23
8. Of a promise in consideration of a precedent debt or duty voidable by statute, &c. i—25
9. Of a contract or promise made upon two considerations, one of which cannot be performed i—26
10. If one of the considerations be illegal, the contract is wholly void i—26.
11. Of a consideration moving from a third person i—27
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See CONTRACT.

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See CONSIDERATION — FRAUDS, STATUTE OF—RESCINDING OF CONTRACTS—STAMPS.

1. All contracts are divided into agreements by *specialty*, and agreements by *parol* i—1
2. Contracts by *parol* are solely the subject matter of the action of *assumpsit* i—1
3. The legal definition of a contract by *parol* i—2
4. Contracts must be made upon a good consideration, and what are valid contracts i—2, 8
5. A contract ought to be certain and complete; and what things are necessary to concur to make it so i—2
6. A contract should be obligatory on both parties, or both should be at liberty to recede therefrom i—3—16
7. No prescribed form of words are necessary to make a contract i—3
8. How contracts and agreements are to be constructed, and of the rules of construction ii—532, &c.
9. A contract conveys an interest either in *possession* or in *action* i—3
10. Contracts are either *executed* or *executory* i—3
11. Contracts for a valuable consideration cannot be set aside in law or equity i—8
12. Of the parties to a contract, and who are competent to enter into a contract i—7
13. Contracts are entered into by individuals, either for themselves or third persons i—7
14. All contracts which have for their object any thing which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void i—30, 34, 45
15. Of the different remedies in case of breach of contract, and of the party's right of election ii—557

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1. A counsel can maintain no action for his fees ii—378
2. So, no action lies to recover back a fee given to a counsel ii—86

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See DEBTOR & CREDITOR — FORBEARANCE, FRAUDS, STATUTE OF—EXECUTION—DISCHARGING A DEBTOR—PROVING A DEBT.

1. A pro-

1. A promise in consideration of discharging a debt is valid i—14 ii—449

2. So a promise in consideration of the assignment of an uncertain debt is also valid i—14

DEBT OF A THIRD PERSON.

See FRAUDS, STATUTE OF—DISCHARGING OF A DEBT.

DEBTOR AND CREDITOR.

1. If all the creditors of an insolvent consent to accept a composition upon their respective debts, under a deed of assignment of his effects in trust; and one of the creditors, before he executes the deed, secretly obtain a promissory note, or other security from the insolvent for the residue of his demand, or as a collateral security, it is void i—38 ii—441 to 447

2. And if in such a deed the creditors covenant to release the insolvent of all debts, &c., it is a discharge not only of debts actually due at the time of executing the deed, but also of all bills outstanding and payable at a future day ii—436, 7

3. So a creditor, after agreeing to enter into such a deed, shall not be allowed, upon refusing to execute the deed, to sue his debtor for the whole debt, after the latter has assigned all his property, in trust for the benefit of his creditors ii—438, 9

4. But a mere agreement to accept a composition without more, is no bar to a creditor's suing for his whole demand ii—439

DEED.

See ASSUMPSIT.

DEL CREDERE COMMISSION.

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1. Nature of a del credere commission i—253

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DEPOSIT MONEY.

WHEN IT MAY BE RECOVERED BACK.

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DISCHARGING A DEBTOR.

See GAOLER, SHERIFF, &c.

1. An action will lie upon a promise to pay money in consideration of discharging a debt, and accepting another as the debtor ii—449

DISTRESS FOR RENT.

See MONEY PAID.

1. Where a landlord is about to distrain the goods of his tenant, for arrears of rent, and a third person promises, in consideration that he will desist from distraining, to pay him the arrears, such a promise is valid, and need not be in writing ii—434

E.

EARNEST.

See SALES.

EAST INDIA SHIP.

See OFFICE—FREIGHT.

1. The Sale of a command of an East India ship is void ii—461

ELECTION.

See ASSUMPSIT—NECESSARIES.

ENEMY.

1. All trading with the subjects of an enemy's country, without the king's licence, is illegal i—36

ESCAPE.

See GAOLER—SHERIFF.

EXECUTOR AND ADMINISTRATOR.

See ADMINISTRATOR—FRAUDS, STATUTE OF.

1. A promise by an executor or administrator to pay the debt of his testator,

teſtator, or inteſtate, muſt be founded upon a conſideration moving to him, otherwiſe it cannot bind him perſonally, though it be reduced into writing i—10, 529 to 536

2. So, a promiſe by an executor or heir at law, who have no aſſets, in conſideration of forbearance to pay the debt of the teſtator, or anceſtor, is void i—10, 532

3. A promiſe by an executor or adminiſtrator, upon any ſpecial promiſe, to anſwer damages out of his own eſtate, muſt be in writing, and ſigned by the party to be charged therewith, and muſt alſo be made on a good conſideration, which muſt be ſet forth in the agreement i 48, 9

4. The executor of a *feme covert* is not liable to be ſued upon contracts made by her during her coverture i—173

5. An executor or adminiſtrator repreſents the perſon of his teſtator or inteſtate as to all *perſonal contracts*; and therefore may maintain an action for the breach thereof, though he be not named in the contract i—522

6. Payment to a perſon who has obtained probate of a forged will, is a diſcharge to the debtor of the inteſtate, notwithſtanding the probate be afterwards declared null and void, and adminiſtration be granted to the inteſtate's next of kin i—523, 4

7. If there be ſeveral executors or adminiſtrators, they have a joint and entire intereſt in all contracts of the teſtator and inteſtate, and muſt all join in an action thereon, although ſome may have omitted to prove the will, unleſs they have formally renounced i—525

8. In an action by an executor or adminiſtrator, upon a contract made with the teſtator or inteſtate, the plaintiff muſt deſcribe himſelf in his repreſentative character i—525

9. But for money due to the teſtator or inteſtate in his lifetime, and received after his death, the executor or adminiſtrator may ſue either as executor, or in his own right; and in ſuch an action the defendant cannot ſet off a debt due to him from the teſtator or inteſtate i—526

10. An executor or adminiſtrator is anſwerable for the contracts and agreements of the teſtator or inteſtate, as far as they have aſſets, though they be not expreſsly mentioned therein; and there is no difference between a promiſe to pay a debt certain, and a promiſe to do a collateral act, which is uncertain and reſts only in damages, except upon ſuch contracts or agreements which require ſomething to be performed by the teſtator or inteſtate, *in perſon* i—528

11. An executor is not liable to pay for funeral expences, unleſs he perſonally contracts with the undertaker i—529

12. If an executor or adminiſtrator, for a good conſideration, promiſe to pay a debt of his teſtator or inteſtate, he is liable *de bonis propriis* i—529—530

13. In a declaration againſt an executor or adminiſtrator, the plaintiff cannot inſert different counts therein, wherever there may be judgment *de bonis teſtatoris* on ſome counts, and on others *de bonis propriis* i—530 ii—523

14. A ſubmiſſion to arbitration by an admniſtrator is not an admiſſion of aſſets. If, therefore, a ſum of money is awarded to be due from the inteſtate, without ſaying by whom it ſhall be paid, the adminiſtrator is not liable to *de bonis proprii*, but only *de bonis teſtatoris* i—536

15. But, it is otherwiſe if part of the ſubmiſſion be, whether or no he has aſſets, and the arbitrator awards againſt him i—538

16. So

16. So a power of attorney given by an executrix, does not authorize the accepting of bills of exchange to charge her, in her own right, for debts due from her teſtator i—536

17. If a debtor appoint his creditor his executor, the latter is allowed to retain his debt, in preference to all other creditors of an equal degree i—538

18. So, if a debtor makes his creditor and another perſon executors, and the creditor neither proves the will nor acts as executor, he may maintain an action againſt the other for his demand on the teſtator i—539

19. But if a creditor appoint his debtor executor, ſuch appointment ſhall operate as a releaſe and extinguiſhment of his debt i—541

20. An executor is liable to an action of *aſſumpſit* upon an expreſs, but not on an *implied* promiſe to pay a pecuniary legacy i—549

21. So, he is liable to an action, without any promiſe, for a legacy of a ſpecifick chattel, after his aſſent to the bequeſt i—552

EXECUTOR DE SON TORT.

1. If a perſon, without any appointment of the teſtator, aſſume the office of executor, by taking poſſeſſion of the aſſets, paying debts, or otherwiſe adminiſtering the effects, he is liable to be charged as executor *de ſon tort* i—542

2. If *A.*, the ſervant of *B.*, ſell the goods of *C.*, an inteſtate, as well after his death as before, though acting under the orders of *C.*, and paying the money ariſing therefrom into the hands of *B.*, *B.* may be ſued as executor *de ſon tort* i—543

3. So, if a creditor takes an abſolute bill of ſale of the goods of his debtor, but agrees to leave them in his poſſeſſion for a limited time; and before the time expires, the debtor dies, whereupon the creditor takes and ſells the goods, he is liable to be ſued as executor *de ſon tort* i—545

4. So, an executor *de ſon tort* cannot diſcharge himſelf from an action brought by a creditor, by delivering over the effects to the rightful executor, after the action brought; nor can he retain his own debt, though of a higher nature, even by the conſent of the rightful executor, given after the commencement of the action i—545

5. But a man who takes poſſeſſion of the effects of the deceaſed, under the authority of, and as agent to the rightful executor, cannot be charged as executor *de ſon tort* i—548

6. Of the diſtinction between the liability of an heir and executor, upon a promiſe to pay the debt of the anceſtor or teſtator ii—426

EXECUTION.

1. An action will lie on a promiſe to pay a precedent debt, in conſideration of reſtoring goods taken upon a writ of execution, under a judgment for that debt ii—433

EXPRESS CONTRACTS OR PROMISES.

See CONTRACT—PROMISES.

1. Contracts or promiſes are either expreſſed or implied i—3

2. Expreſs contracts or promiſes ought to be certain and explicit; but certainty to a common intent is ſufficient i—4

3. No expreſs contract can be raiſed from a mere caſual ſpeaking or diſcourſe i—5

F.

FACTOR.

See PRINCIPAL, FACTOR, & AGENT.

FACTORAGE.

See PRINCIPAL, FACTOR, & AGENT.

FATHER AND SON.

See NECESSARIES.

1. A father living in the country, is not liable for neceſſaries furniſhed his

his ſon, who reſides in *London*, and has a reaſonable allowance made to him for neceſſaries i—166

2. A man is not bound by law to provide neceſſaries for his wife's children by a former huſband. i—167

3. But if he takes them into his houſe, and they become part of his family, he is liable for neceſſaries furniſhed them by order of his wife i—168

4. Where a ſon, being of age, oſtenſibly appears as the proprietor and conductor of a buſineſs, he alone is liable to be ſued on contracts made concerning the buſineſs, though in fact the buſineſs actually belongs to the father, who happens to be ſuperannuated i—169

5 A ſon having a general authority to receive and pay money for his father, received money due on a bill, and ſigned a diſcharge for the ſame, but afterwards voluntarily gave the money to a ſtranger: the father can only recover it back from the donee, the debtor being diſcharged i—245

FEME COVERT.

See MARRIED WOMAN.

1. A *feme covert* ſole, trader in *London*, is liable to be ſued as a *feme ſole* in the *city* courts, but not in the ſuperior courts at *Weſtminſter* i—184

FOOT RACES.

See WAGERS.

FORBEARANCE.

See DISTRESS FOR RENT—EXECUTION—EXECUTOR—FRAUDS, STATUTE OF—HEIR.

1. In what caſes an action will lie upon a promiſe to pay money, &c in conſideration of forbearance to ſue [illegible] i—13, 14, 17
ii—420 to 425

2. If ſuch a promiſe be made by a third perſon, it muſt be reduced into writing, otherwiſe it is void by the ſtatute of frauds ii—420. *n. b.* i—50

3. If an heir be bound in a bond of his anceſtor, and has aſſets, and promiſes in conſideration that the obligee will forbear to ſue him, he will pay the debt; an action lies on ſuch promiſe: but if the heir be not bound by the bond, no action will lie ii—425

4. A promiſe, in conſideration of forbearance to ſue, where there is no good cauſe of action, is void i—13, 14, 17
ii—431, 2

FRAUD.

1. All contracts infected with fraud are void, both at law and in equity i—37

2. Fraudulent repreſentation and concealment of material circumſtances, vitiate a contract i—38

FRAUDS, STATUTE OF.

1. OF PROMISES BY EXECUTORS AND ADMINISTRATORS.

1. A promiſe by an executor or adminiſtrator, upon any ſpecial promiſe, to anſwer damages out of his own eſtate, muſt be in writing, and ſigned by the party to be charged therewith, and muſt alſo be made on a good conſideration, which muſt be ſet forth in the agreement i—48, &c.

2. OF PROMISES TO BE ANSWERABLE FOR THE DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER.

1. A promiſe to be anſwerable for the debt, default, or miſcarriage of another, muſt be in writing, and ſigned by the party to be charged therewith i—50

2. Thus, where *A.*, in conſideration that *B.* would let to hire a horſe to a third perſon, *A* promiſed that ſuch third perſon would re-deliver it to *B.*; this is a promiſe within the

the ſtatute, and muſt be in writing i—51

3. So, a promiſe by *A.* to *B.* (on behalf of *C.*) that he will ſee him paid, or be anſwerable for *C.*, is within the ſtatute, and muſt be in writing i—52, &c

4. But a note written by the defendant to the plaintiff, requeſting him to pay a ſum of money to a third perſon, on account of work done for an infant, is an original, and not a collateral undertaking, and not within the ſtatute i—56

5. So, a promiſe by *B.* to *A.* to pay 10*l.* and the coſts of an action againſt him, and two others at the ſuit of *A*, in conſideration that *A.* would not further proſecute his action, need not be in writing i—60

6. So, a promiſe by *A.* to *B.* to pay 50*l.* and the coſts of an action of aſſault againſt *C.*, in conſideration of withdrawing the record, is not within the ſtatute i—60

7. So, a promiſe by a broker who was employed to ſell the goods of a tenant, that he would pay the landlord the arrears of rent due to him, in conſideration that he would not diſtrain, &c. need not be in writing i—61

8. So, if a man ſend the carriages of another to a coach-maker to be repaired, and engage to pay for the repairs, this is not within the ſtatute i—62

9. So, in conſideration that a policy-broker, who had accepted a bill of exchange on behalf of his principal, and held ſeveral policies of inſurance belonging to him, upon which he had a lien, would deliver thoſe policies to *B.*, he undertook to pay him the amount of the bill, and all coſts and charges he might be put to on the bills; this is not within the ſtatute, and need not be in writing i—63

10. So, a promiſe by *A.* to pay the debts of *B.*, in conſideration of the creditor's aſſigning thoſe debts over to *A.*, is not a promiſe within the ſtatute i—65

11. But a promiſe to pay the debt of a third, in conſideration of forbearance only, is within the ſtatute, and muſt be in writing i—68

12. So, a promiſe by the indorſer of a diſhonoured note, to indemnify the holder, if he will proceed to enforce the payment againſt the other parties thereon, muſt be in writing i—68

13. So, a *parol* promiſe to pay the debt of another, and alſo to do ſome other act, is void, the contract being entire i—70

14. In all caſes which fall within this part of the ſtatute, the conſideration as well as the promiſe muſt be ſtated in the agreement, otherwiſe it will be void i—71

3. OF PROMISES IN CONSIDERATION OF MARRIAGE.

1. No action ſhall be brought whereby to charge any perſon upon any agreement made upon conſideration of marriage, unleſs the agreement, or ſome memorandum thereof be in writing and ſigned i—72

2. This part of the ſtatute does not relate to mutual promiſes to marry, but only to promiſes to pay money, &c. in conſideration of marriage i—72

3. In the caſe of a *parol* agreement to pay money or make a ſettlement in conſideration of marriage, a ſubſequent marriage is not ſuch a part execution of the agreement as will take the caſe out of the ſtatute; but a ſubſequent marriage and ſettlement is ſufficient i—73

4. Letters from parents, or perſons *in loco parentis* containing promiſes of proviſions in conſideration of marriage, if reduced to a ſufficient certainty, have been held to ſatisfy the ſtatute i—73

4. Of a Contract or Sale of Lands, &c.

1. No action ſhall be brought to charge any perſon upon any contract or ſale of lands, tenements, or any intereſt in or concerning them, unleſs the agreement or memorandum thereof be in writing and ſigned i—75

2. But a *parol* agreement for the ſale of timber growing upon the land is not within the ſtatute i—75

3. So, a *verbal* agreement to let certain pieces of fen land, rent free, for the purpoſe of putting them in a ſtate of cultivation, and in conſideration of the tenant's allowing the landlord a moiety of the crops: whilſt the crops were on the ground an appraiſement of them took place, and the value aſcertained: this latter circumſtance was held ſufficient to take the caſe out of the ſtatute i—75

4. But, a *parol* contract with the owner of a cloſe for the purchaſe of a growing crop of graſs to be mown and made into hay by the vendee, is within the ſtatute, and muſt be in writing i—76

5. So, all *freehold rents* are within the operation of this clauſe of the ſtatute, as coming under the word *tenements* i—79

6. So, alſo a ſhare of the *New River water* falls within the deſcription of land or tenements i—80

7. But all *equitable liens* on lands are out of the ſtatute; therefore a leaſe, depoſited as a ſecurity for a ſum of money borrowed under a *parol* agreement, was decreed to be ſold, and the lender to be paid the money i—80

8. So, in the caſe of a *parol* agreement for the ſale of lands, if there has been a part-performance of the agreement it is ſufficient to take the caſe out of the ſtatute i—81

9. What ſhall be deemed a ſufficient part-performance in this caſe i—81 to 86

5. Of Agreements not to be performed within a Year.

1. No action ſhall be brought to charge any perſon upon any agreement that is not to be performed within the ſpace of one year from the making thereof, unleſs the agreement, or ſome memorandum be in writing, ſigned by the party to be charged therewith i—87

2. Upon this part of the ſtatute it has been determined, that if no time be ſtipulated for the performance of the agreement, and it is capable of being performed within a year from the making thereof, it is not within the ſtatute, though it be not actually performed till after the year i—87, &c.

6. Of Contracts for the Sale of Goods.

1. No contract for the ſale of goods for the price of 10*l.* and upwards ſhall be allowed to be good, except the buyer ſhall accept part of the goods ſo ſold, and actually receive the ſame, or give ſome thing in earneſt to bind the bargain, or ſome memorandum in writing, ſigned by the party to be charged by ſuch contract, or his agent lawfully authorized i—89

2. It is not ſettled whether public ſtock, and the ſhares of a company are comprehended under the words "goods, wares and merchandizes" i—89 to 92

3. *Executory* and *executed* contracts are within the ſtatute i—92

4. Therefore a *verbal* agreement to ſell and deliver three thouſand ſacks of flour to be put in ſacks, which the buyer was to ſend to the vendor's mill, and from thence to be ſhipped on board veſſels to be provided by the vendor, is within the ſtatute i—93

5. Upon a *parol* contract, however, for the ſale of goods *actual* delivery is not in all caſes neceſſary; as where the goods are ponderous, if the buyer accepts a written order from the ſeller for the delivery thereof; if he accepts the key of the warehouſe where

where the goods are depoſited, and the buyer exerciſes acts of ownerſhip over them, this will be deemed a ſufficient delivery to ſatisfy the ſtatute i—96 to 9·

6. So, a delivery of a ſample, if it be conſidered a part of the bulk, is ſufficient to take the caſe out of the ſtatute i—96, 125

7. But, not ſo where the ſample is expreſsly found to be no part of the bulk i—99

8. So, a delivery without an ultimate acceptance, and ſuch as completely affirms the contract is not ſufficient to ſatisfy the words of the ſtatute i—101

7. OF THE CONTENTS AND SIGNATURE, &c. OF THE AGREEMENT OR MEMORANDUM REQUIRED BY THE STATUTE.

1. The promiſe contained in the 4th ſection of the ſtatute muſt not only be upon a good conſideration, but the conſideration muſt be ſet fourth in the agreement i—103

2. But a different rule of conſtruction applies to the 17th ſection of the ſame ſtatute i—108

3. With regard to the ſignature to an agreement for the *ſale* of *land*, it muſt be ſigned either by the party to be charged, or by his agent i—103

4. The ſignature may be either to the agreement or memorandum which contains the terms of the ſale, or it may be to letters, &c. referring to a paper which does contain them i—109 to 113

5. A vendor ſubſcribing a deed as a witneſs only, has been held to be a ſufficient ſignature within the meaning of the ſtatute i—111

6. So the ſignature of a clerk of the vendor to an agreement for the ſale of *lands*, though in the character of a witneſs, is a ſufficient ſigning i—114

7. A particular of ſale in writing is not ſufficient to take a caſe out of the ſtatute, unleſs the party purchaſed by it, or it was ſhown to him at the time of the purchaſe i—114

8. The agreement or memorandum muſt always import the aſſent and privity of both parties to be charged; and therefore a mere entry in a ſteward's book of contracts with the tenants is not ſufficient evidence of the agreement for a leaſe between a lord and his tenant i—115

9. If a contract be entire; and any part of it be void by the ſtatute, the whole muſt fail: as where an agreement is made for the ſale of *freehold premiſes* and *ſtock in trade*, if the agreement be void as to the freehold, it is alſo void as to the ſtock in trade i—115

10. In the caſe of the ſale of goods, where an order had been given for a quantity of goods, and a bill of parcels with the vendor's *name* printed thereon was delivered at the ſame time to the buyer, a ſubſequent letter written and ſigned by the vendor referring to the order, is a ſufficient ſignature within the ſtatute i—116

11. But, a note or memorandum for the ſale of goods not containing the name of the buyer, and ſigned by the ſeller only, is not ſufficient i—118

12. Upon a ſale of *goods* by public auction, the auctioner is conſidered as the agent for the buyer, and his putting down in writing the name of the buyer and the price, &c. is ſufficient to ſatisfy the 17th clauſe of the ſtatute i—119 to 126

13. So a ſale of goods by a broker, who delivers a ſale note to the buyer and ſeller reſpectively, ſigned with his name, is a ſufficient contract within the meaning of the ſtatute i—127

14. But in the caſe of a ſale of *lands* by public auction, the auctioneer is not conſidered as the agent of both parties; and therefore his entering the name of the vendee of a lot of land in his book as the purchaſer, is not a ſufficient note in writing within the meaning of the 4th clauſe of the ſtatute i—128

FREIGHT.

1. The nature and meaning of a contract for freight i—342

2. If a ſhip ultimately proceeds with her cargo to the place of deſtination, the owner is entitled to freight, though ſhe may have been captured and re-captured during her voyage i—342

3. Where the cargo conſiſts of animals, if any of them die during the voyage, the owner is entitled to his freight as well for the dead as the living, if the contract be for the *lading*; but where it is for *tranſporting* them, he is only entitled to freight for the *living* i—342

4. Where money is agreed to be paid for receiving goods on board, in order to be tranſported, ſuch money cannot be ſued for as freight i—342,3

5. If a pregnant woman be delivered during the voyage, no freight is payable for the infant i—343

6. When goods are ſent in a general ſhip, the amount of the freight is either ſettled by agreement of the parties, or by uſage of trade i—343

7. In the caſe of a charter-party, if the ſtipulated payment be a groſs ſum for an entire ſhip, or for the whole voyage, the groſs ſum will be payable, although the merchant may not have fully laden the ſhip i—343

8. So, if a certain ſum be ſtipulated for every ton, or other portion of the ſhip's capacity for the whole voyage, the payment muſt be according to the number of tons which the ſhip is capable of containing, without regard to the quantity actually put on board by the merchant i—343

9. But if a merchant ſtipulates to pay a certain ſum *per* caſk or bale of goods, or ſo much *per* ton which he ſhall lade on board, the payment can only be on the quantity actually ſhipped: but if he further covenants to furniſh a complete lading, or a ſpecific quantity, and fails in doing ſo, he muſt make good the loſs which the owners may in conſequence ſuſtain i—343

10. So where a ſhip hired to go beyond ſea, to fetch home a cargo, for which a certain rate *per* ton was to be paid, nothing being payable for the outward voyage, was forced to return in ballaſt, the merchant's factor not having goods to put on board, payment of freight was decreed i—343

11. The owner is entitled to freight on goods delivered to and received by the merchant at the place of deſtination, though they be damaged by a peril of the ſea; and the owner is not liable for the expence incurred by the merchant in endeavouring to remove the injury occaſioned thereby i—344

12. It is, however, doubtful whether the merchant is bound to receive the damaged goods, or whether he is not at liberty to abandon them, and thereby diſcharge himſelf of the freight i—344

13. In the *Weſt India* trade the freight of ſugar and molaſſes is regulated by the weight of the caſks at the port of delivery here i—345

14. The owner is entitled to freight though the merchant be prevented from loading the ſhip in conſequence of a prohibition by government i—345

15. But if a *Britiſh* merchant charter a *Swediſh* ſhip, on a voyage to *St. Michael*, for a cargo of fruit, under the uſual exception of reſtraint of princes, &c., and the ſhip is prevented from reaching *St. Michael*'s within the fruit ſeaſon by reaſon of an embargo, the owner, in ſuch caſe, is not entitled to freight i—346

16. In what caſes an apportionment of freight is allowed i—347

17. If

17. If a ſhip by reaſon of any diſaſter goes into a port, ſhort of the place of deſtination, and is unable to proceed further on her voyage, he may hire another ſhip, and ſo complete the voyage; or if he declines doing this, and the goods are there received by the merchant, the general rule is, that freight ſhall be paid according to the proportion of the voyage performed, though there are exceptions to this rule i—347 to 354

18. The right to freight does not commence till the ſhip has broken ground, and begun her voyage i—355

19. Where a ſhip is hired by a charter-party to ſail from one port to another, and from thence back to the firſt, and the whole is one entire voyage, the owner is not entitled to freight if ſhe happen to be loſt on her homeward voyage, though ſhe may have delivered her outward-bound cargo in ſafety: but if the outward and homeward voyage are diſtinct, freight is payable for the proportion of the time employed in the outward voyage i—356 to 359

20. If there be no agreement as to the time and manner of payment of freight, the goods conveyed remain as a ſecurity until the freight is paid; for the maſter is not bound to deliver them without payment; and the conſignee is in general liable to the payment thereof i—359, 360

21. The mortgagee of a ſhip is not entitled to ſue for freight until he actually takes poſſeſſion of the ſhip i—361

22. Where a ſhip is freighted by the *month*, it is to be underſtood of a *calendar*, not a *lunar* month i—363

23. If there be no charter-party or other deed under ſeal, the freight is recoverable by action of *indebitatus aſſumpſit*; but if the contract for the payment thereof be by deed, the form of action muſt be either *debt* or *covenant* i—363

G.

GAOLER.

See MONEY HAD AND RECEIVED.

1. If a gaoler voluntarily ſuffers a priſoner for debt to eſcape, and in conſequence thereof is obliged to pay the debt, he cannot recover it over againſt the priſoner, though there be an expreſs promiſe to pay, &c. ii—203, 435

GAMING.

See WAGERS.

1. A contract for money won at play, and all ſecurities for money won or lent at play are void i—41, 2

2. But money lent to play with, or to pay a gaming debt, is not prohibited, and may be recovered by action of *indebitatus aſſumpſit* i—42 ii—143 to 148, 151

GOODS.

See SALES—FRAUDS, STATUTE OF—BAILMENT—CARRIERS—DISTRESS—EXECUTION—STAMPS.

H.

HEIR.

1. If an heir, having aſſets, be bound by a bond of his anceſtor, and promiſes in conſideration that the obligee will forbear to ſue him, to pay the money due thereon, an action of *aſſumpſit* will lie upon this promiſe: but if the heir be not bound by the bond, no action is maintainable ii—425

2. Of the diſtinction between the liability of an heir and executor upon a promiſe to pay the debt of the anceſtor or teſtator ii—426

HOUSES.

See MONEY HAD AND RECEIVED —USE AND OCCUPATION— LANDLORD AND TENANT.

1. To an action againſt the vendee for not taking premiſes purchaſed by him, it is no ground of objection that the vendor, at the time of the ſale, had not a good title, provided he obtains one before he is called upon to deliver an abſtract, and to complete the ſale ii—526

2. But where *A.* agreed to underlet his houſe to *B.* upon his paying for the furniture; it is a good objection to *B.*'s not completing the agreement that *A.* did not, at the time of quitting the houſe, pay up his arrear of rent due to the landlord ii—527

3. If a houſe is partially burnt before the day on which the tenant is to take poſſeſſion, it is undecided whether or no an action will lie for not taking poſſeſſion, and alſo for the rent ii—528

HORSE RACES.

See WAGERS.

HUSBAND AND WIFE.

See MARRIED WOMEN— NECESSARIES.

1. A contract made by the wife, with the aſſent of her huſband, is good, and ſhall bind the huſband i—178

2. So, where a huſband permits his wife to act for him in any department or buſineſs, her contracts and acknowledgments therein ſhall bind him i—178

3. So, if a married woman contracts by *deed* with a ſervant for wages, the huſband is liable to be ſued in *aſſumpſit* for the amount of the wages, after the ſervice is performed i—178

4. All perſonal property belonging to the wife, at the time of the marriage, is veſted in the huſband i—185

5. So, *choſes* in action, as debts due to the wife, are ſo far veſted in the huſband, that he may reduce them into poſſeſſion by action: but if he dies before any alteration is made, they ſhall go to the wife i—185

6. The huſband is entitled to whatever his wife earns during the marriage i—185

7. But, where his wife's eſtate is in truſt, he is not entitled to ſue for the rents and profits thereof, which have been wrongfully received by a ſtranger; the truſtee alone muſt ſue i—185

8. A huſband is liable for his wife's debts before marriage, but if any of the creditors neglect to recover them during her life time he is diſcharged i—185

9. A huſband is liable upon his wife's contracts for neceſſaries whilſt they cohabit together i—186

10. So, where the huſband leaves his wife, or refuſes to permit her to live with him, or if he treat her ſo ill as to oblige her to depart from his dwelling; in either of theſe caſes the law makes the huſband liable for neceſſaries i—186 to 191

11. So, where a wife dies, whilſt her huſband is abroad, and a third perſon pays the expences of her funeral, &c which is ſuitable to the rank and fortune of the huſband, he is liable for the amount thereof i—192

12. So, if money be lent to the wife with the expreſs aſſent of the huſband, the latter is liable to be ſued for the ſame i—92

13. Though a huſband is not bound to provide for the children of his wife by a former huſband, yet if he take them into his family, he ſhall be deemed to ſtand *loco parentis*, and be liable to a contract made by his wife for their education, &c. i—192

14. Neceſſaries furniſhed to a married woman muſt appear to be ſuitable to the eſtate and condition of the huſband i—192

15. If the wife departs from her husband without his consent, and the husband prohibits any one from trusting her, he is not liable even for necessaries i—192, 3

16. But if a wife is willing to live with her husband, but he refuses to receive her into his house, it is equivalent to turning her out of doors; and is therefore liable for necessaries furnished her i—195

17. So, if the husband has paid for necessaries furnished the wife whilst living apart from him, he thereby gives her credit to contract for future necessaries i—194

18. Where a married woman elopes from her husband, and afterwards contracts a debt, neither the husband or wife are liable i—195, 6

19. So, if a husband and wife be separated by mutual consent, and the husband secures to her a separate allowance by deed, and this be generally known in the place where the husband resides, he is not liable for necessaries furnished her, even in a strange place where the circumstances of the separation are wholly unknown i—199

20. But if the husband, in such case, fails to pay the stipulated allowance, he is liable i—199

21. Where the wife elopes from her husband, and lives in a state of adultery, the husband is not liable for necessaries, though she be desirous of returning, and offers to live with her husband i—211

22. But where a husband leaves his wife in possession of his house, in consequence of her having kept up an adulterous intercourse therein, he is liable for necessaries afterwards furnished to her at the house, even though she be then living in a state of adultery i—213

23. Where the husband and wife are separated *a mensâ et thoro*, the husband is not liable for necessaries furnished the wife i—214

24. So, where the wife is in gaol under a sentence, for a crime committed by her, it seems doubtful whether or no the husband is liable for necessaries furnished to her by the gaoler during her confinement i—214

25. If a man and woman live together, and pass in the world as husband and wife, the man is liable to all contracts entered into by the woman, in the same manner as he would have been liable if they had been actually married i—214

26. In what cases the husband and wife may sue or be sued either jointly or separately i—216, 217

I.

ILLEGAL CONTRACTS.

See CONTRACTS—MONEY HAD AND RECEIVED—WAGERS.

1. All contracts which have for their object any thing that is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void i—30

2. What contracts are void by common law, or by statute i—30 to 46

3. In what cases money paid upon illegal contracts may be recovered back — *See* Money Had and Received.

IMPLIED CONTRACTS, OR PROMISES.

1. Of the nature of implied contracts i—5

2. Implied contracts are founded on some legal liability to pay a debt, or perform a duty i—5

3. In what cases the law will raise an implied promise i—5, 6, 7.

INFANTS.

See FATHER AND SON—NECESSARIES.

1. All contracts with an infant, except for necessaries, are void or voidable i—148, 152

2. There

2. Therefore if an infant be in trade, and contract a debt in buying goods, &c. for his trade, it is not recoverable, though he thereby gains his living i—148, 9

3. So, where an infant keeps a common inn, he is not liable to an action on the case upon the custom of inns i—150

4. So, it is said he is not liable for repairing houses belonging to him i—149

5. So, a bill of exchange, or other written contract made by an infant, except for necessaries, is voidable by him i—149, 150

6. But, although a bill be drawn, indorsed, or accepted by an infant, it will nevertheless, be binding upon all the other parties thereon, who are of full age i—150

7. If an infant submit a matter to arbitration, and an award be made against him, he may perform or avoid it at his election i—150

8. A contract made with an infant cannot be converted into a *tort*, so as to make him liable in that form of action i—150

9. But he is liable to an action for money embezzled by him i—151, 2

10. Infancy is a *personal* privilege, of which none but the infant himself can take advantage: therefore a contract made by an *adult* with an *infant*, may be enforced by the latter, against the former i—152, &c. ii—410

11. If an infant pay money lost at play, he may recover it back by action i—154

12. But where an infant makes a contract for necessaries, it is neither void nor voidable: as if he contract for his necessary diet, apparel, washing, lodging, education, &c. i—154, 5

13. So, a captain in the army, though under age, is liable for a livery ordered by him for his servant, it being suitable to his rank in life; but he is not liable for cockades ordered for the soldiers of his company i—155

14. In all cases it must appear that the articles furnished to an infant are suitable to his estate and condition in life i—156

15. But where an infant is living with his parent, and properly maintained by him, he is not liable to a stranger, even for what might otherwise be allowed as necessaries i—156

16. So, where a father, living in the country, settles his son in *London*, and allows him a suitable sum for necessaries, which is regularly applied to that purpose, he is not liable for his son's cloaths furnished by a stranger i—166

17. If an infant is boarded and educated by a schoolmaster, he is liable for the same, unless he is put there by his parents or guardians, in which case they alone are liable i—157, 8

18. An infant is liable for a fine due on his admittance to a copyhold estate i—158

19. So, if an infant enters into a single bill, bill of exchange, promissory or other note, for necessaries furnished him, he shall be bound by such obligation i—158

20. He is also liable for money actually laid out in the purchase of necessaries i—158

21. So, money paid for an infant to procure his liberation from an arrest for a debt contracted for necessaries, is recoverable against him i—159

22. But if an infant enter into a bond, with a *penalty* conditioned, to pay for necessaries, it is void i—160

23. If an infant and a person of full age enter into contract, this is good against the adult, though void as against the infant, and the adult alone must be sued i—160, 165

24. Money lent to an infant is not recoverable againſt him, though he actually lays it out for neceſſaries i—161

25. So, an *inſimul computaſſent*, or account ſtated for neceſſaries, lies not againſt an infant i—161

26. In an action brought againſt an infant in *England*, upon a contract made with him abroad, he muſt, on the trial, prove that by the law of that country he would not be liable thereon, otherwiſe he will be deemed liable here i—161

27. If an infant, after he comes of age, ratifies a contract made by him during his minority, by an abſolute promiſe to pay, he is liable to be ſued thereon i—162, 3

28. But ſuch promiſe muſt be made voluntarily, and with knowledge that the party was diſcharged by reaſon of his nonage i—164

29. So, where one promiſe to pay a debt contracted by him during his infancy, *when he is able*, his ability may be proved by his oſtenſible appearance and circumſtances, as they are open to the obſervation of the world i—164

INFORMATION.

See SERVICES AND WORKS.

INNKEEPER.

See BAILMENT—NECESSARIES.

INSIMUL COMPUTASSENT.

See ACCOUNT STATED.

INSURANCES.

See POLICIES OF INSURANCE—LOTTERY MONEY HAD AND RECEIVED PREMIUMS OF INSURANCE.

INTEREST.

1. An expreſs contract or promiſe to pay intereſt is lawful, if it do not exceed the rate allowed by ſtatute; and it may be recovered by action of *aſſumpſit* or *debt* i—207

2. But no action lies for intereſt upon an *implied* aſſumpſit i—207

3. Intereſt, however, is recoverable in actions of *aſſumpſit* for money lent; money paid; money due upon bills of exchange and promiſſory notes; and on other contracts, where a ſpecific ſum is to be paid on a day certain. But it is not allowed in actions upon an account ſtated, or for goods ſold and delivered, or work and labour, unleſs there be a ſpecial agreement, or a particular cuſtom of trade, &c. i—207,8

INVENTION.

1. If a perſon, deſirous of being acquainted with the particulars of a new invention, promiſes, in conſideration of being informed thereof by the inventor, not to take any advantage of ſuch communication, he is liable to be ſued on ſuch promiſe, if he afterwards takes any undue advantage thereof i—481

L.

LANDLORD AND TENANT.

1. The mere relation of landlord and tenant is a ſufficient conſideration to raiſe an implied promiſe, on the part of the tenant, to uſe and manage the farm in an huſband like and proper manner ii—529

2. What is ſufficient proof of a tenant's not uſing a farm in a huſbandlike manner, according to the cuſtom of the country ii—529

3. A tenant from year to year is only bound to fair and tenantable repairs, ſo as to prevent waſte or decay of the premiſes; he is not bound to do ſubſtantial and laſting repairs ii—530

4. If in an action upon an agreement that a tenant will leave the premiſes in as good condition as he found them, it is proved that he found them in tenantable repair, this

this is sufficient evidence to presume that he agreed to leave them in tenantable repair ii—530

LANDS.

See HOUSES—FRAUDS, STATUTE OF—LANDLORD AND TENANT—MONEY HAD AND RECEIVED—USE AND OCCUPATION.

LEGACY.

See SERVICES AND WORKS.

1. An action of *assumpsit* will lie against an executor, upon an *express* though not on an *implied* promise to pay a pecuniary legacy i—549
2. So, an action will lie against an executor, without any promise, for the legacy of a specifick chattel, after his assent to the bequest i—552

LETTERS.

See STAMPS.

LIEN.

See CARRIERS—FREIGHT—OWNERS AND MASTERS OF SHIPS—PRINCIPAL, FACTOR, & AGENT.

LIMITATIONS, STATUTE OF.

1. An action of *assumpsit* must be brought within six years next after the cause of it has accrued ii—571

LIQUORS.

1. No action will lie for liquors sold for less than 20*s.* at one time i—46

LOTTERY.

See MONEY HAD AND RECEIVED.

1. All contracts and agreements for the sale of any tickets or shares in any private lottery, or chances of tickets in any public lottery, and all insurances of numbers therein, except by the holders of tickets, are void i—43
2. In what cases money received on illegal insurances in the lottery is recoverable back. *See* MONEY HAD AND RECEIVED.

M.

MAINTENANCE OF SUITS.

1. In what cases the maintenance of suits is illegal, or not i—34

MAIL COACHES.

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MARRIAGE.

See FRAUDS, STATUTE OF.

1. A promise to pay money in consideration of marriage, is valid; but such promise must be in writing i—15 ii—415 to 418
2. So, the discharge of a promise of marriage is a good consideration to support a promise i—15
3. So, an action lies upon mutual promises of marriage i—15 ii—408, &c.
4. A contract which totally restrains a person from marrying, or which restrains a man from marrying any one except a particular woman, is void i—33 ii—412
5. Marriage brocage contracts are void i—33
6. In an action for breach of promise of marriage, where the defence is, that the plaintiff was a woman of bad character, hearsay evidence of her character in the neighbourhood is admissible ii—415

MARRIED WOMEN.

See HUSBAND AND WIFE—NECESSARIES.

1. A married woman cannot contract, without the assent of her husband; and therefore all contracts made by her, without such assent, are void i—172

2. So, a note or bill indorſed by a married woman is void i—172. 185

3. So, the executor of a married woman, living apart from her huſband and trading as a *feme ſole*, is not liable to be ſued upon contracts made by her during coverture i—173

4. A married woman living apart from her huſband, and having a ſeparate maintenance, ſecured to her by deed, is not liable to be ſued upon a contract made by her during the marriage; nor is her ſecond huſband liable to be ſued upon ſuch a contract i—174, &c.

5. But a contract made by a married woman, with the aſſent of her huſband, is valid, and he alone is liable to be ſued thereon i—178

6. Where the huſband is baniſhed, or has abjured the realm, or is living in exile, the law conſiders him as civilly dead, and ſhe may ſue and be ſued as a *feme ſole* i—179

7. So, where the huſband reſides abroad, without any probability of his returning to this country, and the wife has repreſented herſelf as a ſingle woman, and contracted as ſuch, ſhe is alſo liable to be ſued as a *feme ſole* i—180

8. But a mere temporary abſence is not ſufficient i—183

9. A *feme covert* ſole trader, in the city of *London*, may contract, and ſue and be ſued as a *feme ſole* in the city courts, but not in the ſuperior courts at *Weſtminſter* i—184

10. A married woman living with her huſband, may contract for neceſſaries furniſhed them and their family, and the huſband alone is liable i—186

11. So, where the huſband leaves his wife, or refuſes to permit her to live with him; or if he treat her ſo ill as to oblige her to depart from his dwelling; in either of theſe caſes the law makes the huſband liable to her contracts for neceſſaries i—186

12. If a married woman elopes from her huſband, and afterwards contracts a debt, neither ſhe nor her huſband are liable i—195, 6

MASTER AND SERVANT.

1. The maſter is liable upon all contracts made by his ſervant, with his authority i—219

2. In what caſes the maſter is liable for goods delivered at his houſe upon credit, by order of the ſervant i—219 to 223

3. A maſter is liable upon a note or bill drawn or accepted in his name, by his ſervant, if he has before paid notes and bills drawn or accepted in the ſame manner i—239

4. But where a ſervant, having damaged his maſter's carriage through negligence, took it to a coach-maker, who had never been employed by the maſter, to be repaired; it was held that the maſter was not liable i—223

5. So, a maſter is not liable where he forbids a tradeſman to deliver any goods, on his account, except his ſervant pays for them i—223

6. A maſter is entitled to the earnings or wages of his apprentice, for ſervices done for a ſtranger i—224, 5

7. But if an hired ſervant, not an apprentice, leave his maſter's ſervice, it is not determined whether the maſter can ſue for the wages earned by his ſervant, in the employ of another maſter i—226

8. A maſter may ſupport an action of *aſſumpſit* againſt his ſervant, for neglect of duty i—226, 7

9. A ſervant may maintain an action of *aſſumpſit* for wages due to him from his maſter i—227

10. Where a perſon is hired as an aſſiſtant, or deputy, to perform the duties of a particular office, at a certain yearly ſalary; and the principal is afterwards appointed to another office, and employs the ſame

ſame perſon to tranſact the buſine's of both offices, ſuch aſſiſtant is not entitled to any increaſe of ſalary, without an expreſs agreement or promiſe of the principal to pay an additional ſtipend i—227, 8

11. If a ſlave comes over to *England*, and continues in the ſervice of his maſter, he is not entitled to any wages, without a particular agreement between him and his maſter. i—228

12. A contract to pay a certain ſum *per annum*, in conſideration of ſervices to be performed, is an entire contract for a year, a. d without a full year's ſervice the party is not entitled to any part of his ſalary i—229

13. But with regard to the common caſe of an hired ſervant, the cuſtom is to pay the ſervant for the time he ſerves, without regard to a year's ſervice i—229

14. So, if a maſter turns away his ſervant, without any previous warning, (except for groſs miſconduct,) the ſervant is entitled to a month's wages i—229

15. A maſter is not legally bound by law to provide medicines, or medical attendance for his ſervant who happens to fall ſick, or meets with an accident, whilſt in his ſervice i—230 to 233

16. If a ſervant receives bills in payment of a debt due to his maſter, inſtead of caſh, and the maſter does not aſſent to it, this is not a valid payment i—244

MASTERS OF SHIPS.

See FREIGHT—DEMURRAGE—OWNERS—SEAMENS' WAGES.

1. In general the maſter is liable for repairs done to his ſhip i—331

2. He is alſo liable for neceſſaries ſupplied his ſhip by his order i—332

3. But wherever it appears that the credit was given ſolely to the *owner*, the *maſter* is not liable i—334

4. Where a ſhip is taken by the enemy, and proceedings are inſtituted in the admiralty, the maſter is not entitled, pending the ſuit in the admiralty, to paſſage money *pro ratâ itineris*, for carrying paſſengers and their luggage i—364

MISTAKE.

See MONEY HAD AND RECEIVED.

MONEY HAD & RECEIVED.

See ASSIGNEES OF A BANKRUPT—EXECUTORS AND ADMINISTRATORS—INFANTS—PARTNERS—TRUSTEES.

1. Of the general nature and benefit of this form of action; when it lies, and what ſum is recoverable therein ii—3. *n. d.* 51. 53. 122.

2. If a man receive money which ought to be paid over to a third perſon, or applied to a particular purpoſe, but which is omitted to be done, this form of action lies to recover it back ii—5

3. So, where *A.*, being indebted to *B.*, gave *B.*'s ſervant an order upon his banker for the amount of the debt, the banker paid the ſervant by a note upon *C.*, who, on the following morning, ſtopped payment; it was held that *B.* might recover the amount of the note from the banker in this form of action ii—6

4. So, where *B.* requeſted *C.* to advance him money, and, by way of ſecurity, gave him an order upon *A.* (who was *B.*'s debtor) requiring him to pay *C.* what ſhould appear to be really due to *B.*, and which order *A.* accepted, and on the credit of which *C.* advanced *B.* money to the amount of the ſum due to him from *A.*; and *B.* afterwards becomes bankrupt, it was held, that *C.* might ſue *A.* in this form of action for the amount of the ſum really due from him to *B.* ii—7

5. So, the aſſignee of a *reſpondentia* bond may recover againſt the obligor, who, by an indorſement thereon,

thereon, has engaged to pay the ſame to any aſſignee ii—10

6. But where *A.*, to whom wages were due from the *Eaſt India* Company, ordered *B.* to receive them, and pay them over to *C.*, to whom he was indebted: it was held, that *C.* could not recover the ſame againſt *B.* in this form of action ii—12

7. An action of *indebitatus aſſumpſit*, for money had and received, lies by the *bonâ fide* bearer of a loſt note, againſt the maker ii—12

8. So, where a forged note has been given, in part payment of a promiſſory note, the amount thereof may be recovered in this form of action from the perſon by whom it was ſo paid ii—13

9. So, a *bonâ fide* indorſee of a bill, made payable to a fictitious payee, may recover the amount thereof in this form of action, againſt the acceptor or drawer ii—14

10. So, where the indorſee of a bill of exchange received a navy-bill, by way of further ſecurity, till the bill of exchange was accepted, which he depoſited with the drawee, who received the amount thereof; it was held that the indorſee might recover it over againſt the drawee, in this form of action ii—15

11. *A.*, the drawer of a bill, lent it to *B.*, who indorſed it to *C.*, by whom it was indorſed over to *D.*; *A.* afterwards received the amount of the bill from *B.*, and paid it over to *C.*, to take up the bill: but before this was done, *C.* informed *A.* that the acceptor had become inſolvent, and that the holder had neglected to preſent the bill, &c; upon which *A.* ordered *C.* not to pay it: he, however, afterwards paid the amount of the bill to the holder, and it was determined that *A.* might recover back from *C.* the money ſo depoſited with him in this general form of action ii—15

12. A mere promiſe by a debtor to his creditor, that if he would draw a bill upon him for the amount of his demand, he would pay it, does not amount to an acceptance of the bill when drawn, nor will it entitle the indorſee, though for a valuable conſideration, to recover againſt the debtor the amount of the bill, upon a count for money had and received ii—16

13. So, where the drawee of a bill of exchange, upon its being preſented to him by the indorſee, accepted the bill, and ſaid that he expected a remittance from the drawer in a few days, and that as he had a bill of the drawer in his hands, which would be paid, he would take all riſk; the indorſee cannot recover againſt the acceptor, upon a count for money had and received, after having failed to eſtabliſh a count upon the bill ii—17

14. If a perſon receives goods, &c. belonging to another, and converts them into money, it may be recovered by action of *indebitatus aſſumpſit*, for money had and received, to recover the money ſo raiſed: as where *A.* got poſſeſſion of a maſquerade ticket, which had been delivered by *C.* to *B.*; and *C.* afterwards demanded the money of *B.*, who referred him to *A.*, who refuſed to pay it; whereupon *B.* paid the amount of the ticket, and brought this form of action againſt *A.*, and recovered ii—18

15. So, where the captain of a troop had received a certain number of horſes, on account of certain troopers of his regiment who had previouſly loſt their horſes which they had brought into the regiment; but before the horſes were diſtributed, the plaintiff was broke, and ſo was never remounted; it was decided that the plaintiff was entitled to recover the value of the horſe againſt the captain in this form of action ii—20

16. But this action does not lie for bank or other public ſtock, unleſs it be actually converted into money ii—20

17. So,

17. So, where goods are diſtrained for rent in arrear, but the landlord delivers them back to the tenant, on his undertaking to pay the arrears of rent, the landlord cannot recover the arrears in this form of action; the goods not having been ſold and turned into money ii—21

2. Of Money Had and Received, by and from Agents, &c. and also by a Receiver General of a County.

1. If money be received by an agent for the uſe of his principal, and he refuſes to pay it over, he is liable to an action of *indebitatus aſſumpſit* for money had and received, at the ſuit of his principal i—261 ii—22

2. So, a book keeper in *Smithfield* market, receiving money for beaſts ſold there, is liable to pay ſuch money to the owner of the beaſts, and cannot apply it in payment of a debt due to him from the ſales man ii—22

3. So, this form of action lies by a leſſee of land againſt the receiver-general of the land-tax, of the county in which it is ſituate, to recover a ſum of money, aſſeſſed by a jury, as a compenſation for the uſe of the land, which had been taken for the public ſervice under the ſtatute 43 *Geo.* 3. c. 55. ii—23

4. So, this form of action lies by the purchaſer againſt an auctioneer, to recover back a depoſit upon a ſale of lands to which no valid title can be made ii—24

5. So, if an agent, either wrongfully or by miſtake, pays the money of his principal, it may be recovered back in this form of action ii—24

3. Of Money Received by a Stake-holder.

1. If money be depoſited in the hands of a ſtake-holder, for the purpoſe of being paid over to the winner, on the event of a legal wager, the winner may recover it of the ſtakeholder, by action of *indebitatus aſſumpſit*, for ſo much money had and received ii—24

4. Of Money Had and Received by Revenue Officers.

1. If duties be paid to a revenue officer by miſtake, and he pays them over to his ſuperior officer before he has notice of the miſtake, no action lies againſt him for the recovery thereof ii—25

2. But this form of action lies againſt a cuſtom-houſe officer, to recover back money paid to him in reſpect of a certain duty which was not legally impoſed, and which he had not paid over to his ſuperior ii—26, 7

3. So, if a revenue officer ſeize goods as forfeited, which are not liable to ſeizure, and take money of the owner to releaſe them, the latter may recover back the money in this form of action ii—28, 9

5. Of Money Had and Received by Sheriffs, Gaolers, &c.

1. If a ſheriff levies money upon a *fieri facias*, the plaintiff may recover it by action of *indebitatus aſſumpſit*, for ſo much money had and received ii—30

2. So, this form of action lies againſt the ſheriff, to recover back money paid by a defendant to the ſheriff's officer, under an arreſt upon meſne proceſs; the officer having undertaken to return it on the defendant's putting in and perfecting bail above, which he had done ii—30

3. So, where a ſheriff's officer, being in poſſeſſion of a tenant's goods, under an outlawry, was employed by the landlord to diſtrain on the ſame goods for the arrears of rent; the officer accordingly diſtrained, and ſold the goods; but afterwards the outlawry was reverſed: the officer was held liable to the landlord in

in this form of action for the amount of the arrears ii—3

4. If a gaoler takes from a priſoner, for lodging, &c. higher rates than thoſe which have been ſettled by magiſtrates of the county, he is liable for the overplus in this form of action ii—33

6. Of Money Paid by Mistake.

1. If one perſon pays money to another, under a miſtake either of fact or of law, an action of *indebitatus aſſumpſit* lies to recover it back ii—35

2. So, if two men reckon together, and one overpays the other; this form of action lies to recover back the money ſo overpaid ii—35

3. But if money be paid upon a forged bill of exchange, to a *bonâ fide* holder, who has given value for it, the money cannot be recovered back ii—35

4. If, however, a bill is reſtrained by a ſpecial indorſement, and afterwards an imperfect forged indorſement is made upon it, and *B.* diſcounts it *bonâ fide*; and when it becomes due, he receives the money from a friend of the drawer, who took up the bill for his honor; the drawer may recover it back from *B* in this form of action, it having been paid to him by miſtake ii—37

5. But where money is paid by one with full knowledge (or means of ſuch knowledge in his power,) of all the circumſtances, he cannot recover it back on the ground of his having paid it under an ignorance of the law i—40

6. So, where *A.* having obtained a patent for an invention, agreed to let *B.* uſe it, upon payment of a certain annual ſum, which was regularly paid for ſeveral years; but it was afterwards diſcovered that *A.* was not the original inventor, and that the invention was in pub[illegible] before he obtained his patent, action lies to recover back the money ſo paid, *B.* having had the uſe of the invention ii—41

7. Of Voluntary Payments.

1. With reſpect to voluntary payments, the rule is, that if a man has actually paid what the law could not have compelled him to pay, but what in equity and conſcience he ought, he cannot recover it back. But where money is paid under a miſtake, and which there is no ground to claim in conſcience, the party may recover it back again in this form of action ii—41

2. But money paid by a maſter to a workman, on account of certain engines, which the latter was ſo long in completing that the maſter wholly loſt the ſale of them, cannot be recovered back, the money having been paid voluntarily ii—41

3. So, where a tenant, under a threat of a diſtreſs, pays a greater rent to his landlord than was agreed for, he cannot recover it back, ſuch payment being conſidered voluntary ii—42

8. Of Money Received by Deceit, or *Malâ fide*.

1. If money be received by deceit, or *malâ fide*, it may be recovered back by action of *indebitatus aſſumpſit* for money had and received: as where a man having a wife, marries another woman, and receives the rents of her eſtates, he is liable to this form of action, at the ſuit of the woman ii—43

2. So, where a woman was nurſe to a man during his illneſs, but after his death, took away the money which he had about him; this form of action will lie to recover it back ii—43

3. So, where a ſon or ſervant wrongfully gives away his father or maſter's money, it may be recovered from the donee in this form of action ii—44

4. So,

4. So, this form of action lies to recover back money paid under a falſe repreſentation to procure another a place, &c. ii—83

9. Of Money Had & Received, Under Legal Process.

1. Money paid under the compulſion of legal proceſs, cannot be recovered back, though it ſhould afterwards be diſcovered not to have been due ii—44 to 46

2. It has, however, been determined, that where money was recieved upon a judgment of a court of conſcience, in conſequence of a material part of the defendant's caſe having been rejected, which could not be gone into in that court, though from which it plainly appeared that the plaintiff ought not, in conſcience and equity, to have recovered, the judgment is not concluſive, and the party paying the money under it may recover it back ii—46

3. Where an action is brought and money is paid under a compromiſe, and not in conſequence of a judgment of a court; but it is afterwards diſcovered that the money was paid by miſtake or deceit, it may be recovered back i—49

10. Of Money Had and Received under a Void Authority, whether Judicial or otherwise.

1. When money is paid under a void authority, an action of *indebitatus aſſumpſit* for money had and received, lies to recover it back; as if money be paid under an order of commiſſioners, who have no competent authority to make ſuch an order, it may be recovered back againſt the perſon to whom it was paid ii—49, 50

2. So, if money be levied by an overſeer of the poor, under a conviction which is afterwards quaſhed, it may be recovered back by the party in this form of action ii—50

3. So, where *A.* took out adminiſtration to a perſon ſuppoſed to have died inteſtate, and appointed *J. S.* his attorney, who received the money due to the eſtate, and paid it over to *A.*; afterwards a will appeared, and it was held that *J. S.* was liable to the executor for the money received; he having received it under a void authority ii—50

4. But, if a debtor pays money to a perſon who has obtained a probate of a forged will, he is not liable to repay the debt, ſuch payment being made under the authority of a court, having competent juriſdiction; but if the ſuppoſed teſtator be living, at the time of granting the probate, the debtor is liable to repay the money; for in ſuch caſe the authority is void ii—51

5. So, where a creditor pays money to the attorney of a perſon who had forged a power of attorney, in the name of the creditor, it is no diſcharge, but he is liable to the creditor; and the attorney is anſwerable to the debtor, though he may have paid the money over to the perſon who employed him ii—51

6. If money be paid for the releaſe of cattle wrongfully diſtrained damage feazant, this form of action does not lie to recover back the money ſo paid; it muſt be either replevin or treſpaſs ii—51

11. Of Money Depoſited upon a Contract for the Sale of Lands, Houſes, &c. which has been either rescinded or not performed, &c.

1. If, upon a contract for the ſale of lands, houſes, &c. the vendee makes a depoſit of the whole or part of the purchaſe-money with the vendor, or his agent, or auctioneer, and the vendor's title happens to be defective, or if the premiſes vary from the deſcription contained in the particulars of ſale, the vendee may refuſe to complete the purchaſe, and he may recover back his

his deposit, by action of *indebitatus assumpsit* for money had and received ii—52

2. But if the vendee has been put to any expence, and has incurred any particular damage, he must declare specially upon the contract ii—53

3. Where a purchase is made which consists of several lots of houses, if from the nature of the contract it be *entire*, the vendor must make a complete title to the whole, otherwise the vendee may rescind the contract, and recover back his deposit ii—53

4. If, however, the contract be not entire, but capable of being separated or divided; as if a purchase is made for two pieces of lands, at two distinct sums, and the title be defective as to one of them only, the vendee may complete the purchase as to one, and recover back his deposit money for the other ii—55

5. But a contract cannot be rescinded by one of the contracting parties for default of the other, unless both of them can be put in *statu quo*, as before the contract: thus if an agreement be to pay 10*l.* upon having a lease executed within a given time, and the premises also put in repair by the lessor; the lessee, on the the faith of the lessor's performing his part of the agreement, paid him the 10*l.*, and took immediate possession; but the lessor refused to execute the lease, or repair the premises, and the lessee continued in possession beyond the period agreed upon for executing the lease, &c.; such an agreement cannot be rescinded, and the consideration money recovered back ii—56, 7

6. Where money is paid by way of deposit upon a contract for the sale of leasehold premises, and it appear either that the vendor has a less term of years to come than what is mentioned in the agreement, or his title be otherwise defective, the purchaser may consider the contract at an end, and recover back his deposit in this form of action ii—58 to 61

7. But if the vendor can make a good *legal* title to the premises sold, it is a sufficient answer in a court of law, though he may not have an equitable title ii—61, 2

8. So, the vendee must prove the title to be really defective; it will not be sufficient to show that it has been deemed so by conveyancers who were employed to advise upon it ii—62

9. A personal representative having found among the papers of his testator, a mortgage deed, assigned it for the mortgage money; six years after this it was discovered to be a forgery, which was wholly unknown to the executor; it was held that he was not liable to refund the purchase money ii—63

10. But where a person supposing himself the legal representative of a lessee for years, sold the term, and delivered the lease, but without any assignment or formal conveyance, saying the premises were his, and if any thing happened he would see the vendee righted; the rightful administrator afterwards appeared, and ousted the purchaser; it was determined, that the purchaser might recover back his purchase money in this form of action ii—63, 4

11. So, if an under-tenant sell fixtures as his own, which afterwards turn out to belong to the lessor, and form part of the items contained in the schedule, he is liable in this form of action for the money paid, although he was wholly ignorant of this circumstance, and had actually paid for them himself when he took the house of the lessee ii—65

12. Where an estate is sold by auction under printed conditions, no verbal declarations of the auctioneer, at the time of the sale, can be admitted as evidence to contradict the printed conditions ii—65

12. Of Money Paid on the Purchase, &c. of Annuities.

1. Where the vendor of an annuity engages that a good title ſhall be made to the vendee on a particular day, he muſt be prepared to produce his title deeds on that day, or the vendee is entitled to reſcind the contract, and recover back his depoſit money in an action of *indebitatus aſſumpſit* for money had and received ii—66

2. So, where the conſideration of an annuity conſiſts partly of money actually paid, and partly of a precedent debt for goods *bond fide* ſold to the grantor; and the annuity is ſet aſide by the court, at the inſtance of the grantor, for ſome miſtake in not complying with the requiſites of the ſtat. 17 *Geo.* 3. *c.* 26., and not on account of any fraud in the tranſaction, the grantee may recover back the conſideration in this form of action ii—67

3. But a perſon who has only lent his name *as a ſurety for the due payment of an annuity*, and has not received part of the conſideration money, he is not liable for any part thereof, though the annuity be ſet aſide ii—69

4. Where a bond and warrant of attorney form part of the ſecurities, and the warrant of attorney only is ſet aſide, the grantee may recover back the conſideration money in this form of action, notwithſtanding the bond remains uncancelled ii—69,70

5. If an annuity be void for a defective memorial, no action will lie to recover back the conſideration money, unleſs the annuity has been ſet aſide by the court, or by mutual agreement of the parties; or the grantor has refuſed to re-execute valid ſecurities, or to pay the annuity ii—71 to 73

6. But where the grantor of an annuity depoſited certain deeds with the grantee intending to charge his real eſtate for the due payment of the annuity, but the grantor is unable to effectuate his intention, and the annuity is in arrear; the conſideration money may be recovered back in this form of action, though the annuity has not been ſet aſide by the court ii—72

7. In an action for the conſideration money of an annuity, the grantor may ſet-off the payments made in reſpect of the annuity, though they may have been made for more than ſix years, unleſs the plaintiff reply the ſtatute of limitations ii—73, 4

13. Of Money Had and Received upon other Contracts, which have been either reſcinded, or not performed.

1. An action of *indebitatus aſſumpſit* lies to recover back money paid upon a contract, which has been either reſcinded, or put an end to; as where, by the terms of the contract it is left in the power of one of the contracting parties to reſcind it, and he does ſo; or where both parties mutually aſſent to its being reſcinded. But if it continue open the plaintiff cannot declare in this general form of action, but muſt declare *ſpecially* upon the contract ii—75

2. Thus where a perſon buys a horſe or chaiſe, and pays the purchaſe money on condition that if upon trial they be not approved the ſeller will take them back; if the horſe or chaiſe be not approved of, and they are returned to the ſeller, he may recover back the conſideration money in this form of action ii—75,&c.

3. But where a perſon bought a pair of coach-horſes, and paid the purchaſe money on condition that the ſeller would take them back if they ſhould be diſapproved of within a month; the plaintiff did return them within a month, but took another pair without making any new agreement; theſe he alſo returned within a month, and took a third

third pair which he disapproved of, and offered to return them within a month, but the defendant refused to take them back; it was held that the contract continued open, and the plaintiff's only remedy was by special *assumpsit* upon the warranty ii—76

4. So, where a person gave a horse of his own and twenty guineas for the horse of another, which was warranted sound, but which proved to be unsound; and the buyer tendered him to the seller, who refused to take him back, it was held that neither *indebitatus assumpsit* or *trover* would lie, but only a special action on the warranty ii—77

5. So, where the seller of a horse had warranted it sound, and in a subsequent conversation said, that if the horse was unsound (which he denied) he would take it again and return the money: this does not amount to an abandonment of the original contract, which still remains open; and though the horse be unsound, the vendee must sue upon the warranty, and cannot recover back the price in this form of action ii—77

6. So, where a plaintiff declares upon a special contract, and fails to establish it in evidence as set forth in pleading, he cannot recover upon the general count for money had and received ii—79

7. Where a person has paid money upon a contract which has not been performed, he may either affirm the agreement by bringing a special action of *assumpsit* thereon for general damages, or he may disaffirm it, and recover back the money paid thereon by action for money had and received. Thus, where *A.* paid *B.* a sum of money, for which the latter agreed to transfer the former five shares in the *Welch* copper mines at the opening of the books; but failed to do so; it was held that *A.* might recover the money so paid in this form of action ii—81, 2

8 So, where an executor gave *B.* a sum of money, in consideration of his giving up certain papers belonging to the testator: after the money was paid, *B.* refused to deliver up the papers; it was held that the executor might recover the money back in this form of action ii—82

9. So, where money is paid to a person upon an agreement to procure him a place, which he has failed in doing, it may be recovered back in this form of action ii—83—But see Ib. 112, 113

10. Where some act is to be done by each party under an agreement, and the defendant by his neglect, prevents the plaintiff from performing his part, the plaintiff may put an end to the contract, and recover back the money paid under it ii—84

14. Of Premiums received upon Marine Insurances.

1. In cases of insurance, the risk or peril insured against is the consideration for which the premium is paid. But where no risk has been run, the consideration for the premium fails; and therefore may, in general, be recovered back by action of *indebitatus assumpsit* for money had and received ii—86 to 89

2 But where the risk has once commenced upon an entire contract of insurance, the assured is not entitled to any apportionment or return of premium, except in the case of usage, &c. ii—90 to 97

3. So, an insurance effected in *Great Britain* on a *French* ship, previous to the commencement of hostilities between *Great Britain* and *France*, does not cover a loss by *British* capture; and the insured is not entitled to a return of premium, because the contract was legal at the time the risk commenced ii—98

4. The captors of ships seized as prize, have an insurable interest therein; and therefore, though a Court of Admiralty adjudge them to be no prize

prize, and award reſtitution to the original owners, yet the captors are not entitled to a return of premium, the riſk having commenced on the voyage home ii—98

5. In what caſes there ſhall be a return of premium upon a ſailing with convoy, and arriving, &c. when proviſions of this kind are inſerted in policies of inſurance ii—98 to 104

6. In caſes of deviation, though the inſurer is diſcharged from his engagement, yet the riſk having once commenced, there can be no return of premium ii—104

7. So, in the caſe of an illegal inſurance, the inſured is not entitled to a return of premium ii—104 to 108

8. So, in all caſes of fraud on the part of the inſured, or his agent, there ſhall be no return of premium ii—108

9. But wherever the underwriter has been guilty of fraud, the inſured may recover back his premium ii—108

15. Of Money Received upon Illegal Contracts and Agreements.

1. When money has been paid upon an illegal contract, it is a general rule, that if the contract be *executed*, and both parties are in *pari delicto*, the money ſo paid cannot be recovered back again: but if the contract continues *executory*, and the party paying the money be deſirous of reſcinding it, he may do ſo, and recover back his depoſit by action of *indebitatus aſſumpſit* for money had and received ii—109

2. But, if a man gives his agent money to be paid to a voter by way of a bribe, he cannot recover it back ii—110

3. So, money paid in diſcharge of a ſecurity, which is void only by ſtatute, and not *malum in ſe*, cannot be recovered back again ii—110

4. So, money paid in order to procure a perſon a ſituation of clerk in a public office, cannot be recovered back; ſuch a contract being illegal, and both parties in *pari delicto* ii—83, 112
Sed vide Ib. 113

5. But where a perſon receives money to the uſe of another, though on an illegal contract, he is not allowed to retain it, but muſt pay it over to the perſon for whoſe uſe he received it ii—113

6. If, upon a *loan of money*, the lender takes more than legal intereſt, the exceſs may be recovered by action of *indebitatus aſſumpſit* for ſo much money had and received ii—113, &c.

7. The borrower, however, cannot avoid the contract, and recover the principal and legal intereſt, but only the exceſs of intereſt ii—113, &c.

8. Exorbitant and illegal intereſt received upon a *pledge* of goods may alſo be recovered back in this form of action ii—115

9. If a loan of money be made to enable the borrower to purchaſe a parcel of goods, and he agrees to give the lender one half of the net profits which ſhould be made upon the reſale of the goods, and alſo gives him his note of hand for the principal, payable on demand: the lender cannot recover from the borrower a moiety of the profits though this does not, in ſtrictneſs, amount to uſury ii—116

10. Money paid to a creditor as a conſideration for ſigning the certificate of a bankrupt, is illegal, and may be recovered back in this form of action ii—117, &c.

16. Of Money Received on Illegal Wagers, &c.

1. If a wager be made on a boxing match, and on the event happening, the winner receives the money won, it cannot be recovered back again; both parties being *in pari delicto* ii—120

2. But where money is paid upon an illegal wager, and the party paying it wishes, before the event happens which is to decide the wager, to put an end to the wager altogether, he may do so, and recover back the money so paid by action of *indebitatus assumpsit* for money had and received ii—120

3. It has also been decided, that if a sum of money is deposited upon the event of an illegal wager, it may be recovered back, even after the has event happened ii—122.
But see note (*n*) *Id. ib.*

4 An action will also lie to recover back money paid to the winner, where any fraudulent means have been used; such as false dice, packing of cards, &c. ii—123

17. Of Money deposited with a Stakeholder upon Illegal Contracts or Wagers.

1. If money be deposited with a stakeholder in order to be paid to the winner, on the event of a battle to be fought by the parties laying the wager, and it be not paid over; each party may recover his deposit from the stakeholder in this form of action, though the event has happened ii—124

2. But where the money has been paid over to the winner, with the consent of the loser, the latter cannot afterwards recover it back ii—125

3. Re-assurances being declared illegal by the stat. 19 *Geo.* 2. *c.* 17., the underwriter cannot recover the premiums thereof from the broker, though he has actually received the amount from his principal, and passed the same in account with the underwriter ii—126

4. So, this action does not lie to recover money deposited with a stakeholder for the purpose of being paid over to the plaintiff for his interest in endeavouring to procure a pardon for a prisoner under sentence of death ii—127

18. Of Money Had and Received on Illegal Insurances in the Lottery.

1. Money paid as a premium for illegal insurances in the lottery, may be recovered back by action of *indebitatus assumpsit* for so money had and received ii—128

2. So, if a servant illegally insures in the lottery, and pays the premium of insurance with his master's money; the master may recover it back against the lottery-office-keeper in this form of action ii—129

3. But where *A.* insured certain numbers with *B.* who insured the same numbers with *C.*, no action lies at the suit of *A.* against *C.* for the premiums paid by *A.* to *B.* ii—130

4. So, where the money paid by the lottery-office-keeper exceeds the amount of the premiums received by him, of the insured, no action lies ii—130, 1

5 So, the insurer or lottery-office-keeper cannot recover back money paid to the insured ii—131

19. In what Cases this Form of Action lies to try the Right to an Office, or to Fees in Respect thereof, and also to Prize Money.

1. In this form of action, it is not unusual to try the title to an office to which there are known and accustomed fees annexed: but such action must be brought against the principal, and not against the collector ii—132

2. So, where a person is entitled to an office with fees annexed, and a stranger intrudes into it, and receives the fees, this form of action lies to recover them: but they must be certain, known, and accustomed

tomed fees annexed to the office, and such as the legal officer could himself recover in a court of law from the persons of whom they are claimed and received ii—132

3. So, the nominee of a perpetual curacy not having subscribed the articles, or been licensed by the bishop, cannot maintain an action for money had and received against one who is in possession of the profits, and who likewise claims to be curate, and has been licensed by the bishop ii—134

4. Where fees of office are demanded and taken, but the party paying them disputes the receiver's right to them, or his own liability to be charged, the question of right may be tried in this form of action ii—135

5. So, this form of action lies to recover back fees demanded and received by one as mayor, such fees not being due to him, but to the chamberlain ii—135

6. So, it lies against the post-master for receiving money which is not demandable for postage ii—136

7. So, it lies against one who receives rent under colour of title ii—136

8. So, it lies against a prize agent, &c. to recover prize money after sentence has been pronounced in the Court of Admiralty in favour of the captors, and the property captured is sold and converted into money ii—136

MONEY LENT & ADVANCED.

1. Money lent by one person to another may be recovered by action of *indebitatus assumpsit* ii—138, 9

2. So, where money is advanced to *B.* at the request of *A.*, who undertakes to be accountable for it, the lender may recover it against *A.* in this form of action ii—138

3. A declaration stating that a *husband* was indebted, &c. for money lent to his *wife*, at his request, has been held to be good ii—140

4. Where money is lent on a pledge, the lender may recover it in this form of action, unless there be an agreement to stand to the pledge only ii—141

5. But if *A.* lend *B.* stock in the public funds, it cannot be recovered in this general form of action; the plaintiff must declare specially on the agreement ii—142

6. Money lent to game with, or to pay a gaming debt, is recoverable in this form of action ii—143 to 148

MONEY PAID.

1. Where a person has laid out and expended his own money for the use of another, at his request, it may be recovered by action of *indebitatus assumpsit* for so much money paid, laid out and expended ii—149

2. If money be paid by *A* to *B*, at the request of *C.*, the latter is liable in this form of action, as for so much money paid to his use ii—150

3. So, money paid for another in discharge of a gaming debt, is recoverable in this form of action ii—151

4. But a mere voluntary payment, or a payment against the consent of the party for whose use it is paid, cannot be recovered by action ii—151

5. Goods of *A*, being on the premises of *B.*, *C.* and *D.*, were distrained for arrears of rent; *A.*, in order to redeem them, was obliged to pay the arrears to the landlord; it was held, that *A.* might recover the money so paid in this form of action against *B.*, *C.* and *D.*, although the two latter had previously assigned their interest in the premises to *B.* ii—152

6. Where *A.* accepts a bill of exchange merely for the accommodation of *B.*, and, when it becomes due, an action is brought thereon against *A.*, who defends it at the instance of *B.*; if the holder recovers against him, and he is obliged to pay the debt

debt and costs, he may recover the amount thereof against *B.* in this form of action ii—154

7. So, where *A.* lent his acceptance to *B.* before his bankruptcy, but which was not paid till afterwards, *B.* is liable to be sued for the money so paid, notwithstanding his bankruptcy and certificate ii—155

8. *A.* ordered goods of *B.*, and in order to enable him to complete the order *A.* accepted a bill which *B.* indorsed, and in order to get it discounted *B.* prevailed upon *C.* to put his name upon it; when the bill became due *C.* paid the bill, *A.* having previously become bankrupt: it was held that *C.*'s only remedy was upon the bill, which was proveable under *A.*'s commission, and that he was discharged by his certificate ii—157

9. So, where *A.* and *B.*, for their mutual accommodation, exchanged acceptances of bills for acceptances of bills of equal sums, which were negotiated; but after this transaction *A.* and *B.* both became bankrupts; and the estate of *A.* paid more upon *B.*'s acceptances than the estate of *B.* did upon *A.*'s acceptances: it was held that no action for money paid would lie against *B.* for the amount of the difference so paid by the assignees of *A.*, the remedy being upon the bills of exchange only which were proveable under the commission ii—158 to 178

10. If a bill is paid for the honour of the drawer, the money so paid may be recovered against him in this form of action ii—178

11. Where a surety pays money in discharge of a bond entered into by him on behalf of his principal, he may recover the money so paid in this form of action, though the bond was forfeited before the bankruptcy of the principal, if the money was not paid till afterwards ii—179, &c.

12. But if a surety (who becomes bound in a bond with his principal for payment of money by instalments) takes a bond from his principal, conditioned for payment of the amount of the instalments before the first of them will become due, the surety cannot declare in this form of action, his only remedy being upon the bond ii—181, 185

13. If a person gives a promissory note for the debt of another, which the creditor accepts as payment; it has been held, that the person giving it may declare against the principal in this form of action, as for so much money paid to his use ii—185

14. But the mere giving a bond and warrant of attorney, as a new security, will not entitle the surety to sue his principal until he has actually satisfied the debt, even though the surety has been arrested, and detained in prison upon the original security, until he had executed the new securities ii—185

15. But where the surety has been taken in execution for the debt of his principal, the latter is liable for the amount thereof in this form of action i—413, 14

16. Where two or more persons become bound for the debt of another, and one of the sureties pays the whole debt, the co-surety is liable in this form of action, for his aliquot proportion of the money so paid ii—186, 7

17. But, if three persons are jointly liable for a debt, and two of them pay it, they cannot maintain a joint action against the third for his aliquot proportion; but each must sue for his particular aliquot share ii—188

18. Where, however, *A.* was engaged as a partner in a particular transaction with *B.*, *C.* and *D.* (who were before in partnership) and paid a joint debt due from himself and them; it was held that he might recover from *B.* the full proportion due from himself and *C.* and *D.* he not having pleaded in abatement ii—189

19. If

19. If *A.* at the inſtance of *B.* became a co-ſurety with him for *C.*, and *B.* pays the whole debt, he cannot recover a moiety from *A.* ii—189

20. So, if two perſons jointly enter into an *illegal* tranſaction, and one of them pays money on account thereof, he cannot ſue his companion for a moiety ii—190

21. So, if *A.* recovers damages in an action of *tort* againſt two defendants, and levys the whole upon one of them, that one cannot recover a moiety againſt the co-defendant ii—190

22. If a party dine at a tavern, and one pays the whole of the reckoning, he may recover from the others their aliquot proportions by ſeparate actions againſt each i—191

23. So, a party liable to contribute a moiety of the expence of building a party-wall may be ſued for his contribution in this form of action ii—191 to 201

24. No action will lie to recover money which has been paid on account of another by reaſon of ſome neglect of duty in the party paying it ii—202 to 205

25. Where a ſheriff's officer diſcharges a defendant on payment of the ſum ſworn to, and is afterwards obliged to pay the reſidue of the debt, he may recover it from the defendant in this form of action, as ſo much money paid to his uſe ii—203

MORTGAGEE.

See OWNERS & MASTERS OF SHIPS.

1. The mortgagee of a ſhip is not liable for neceſſaries furniſhed the ſhip previous to his taking poſſeſſion of her i—335

MUTUAL CREDIT.

See BANKRUPT.

MUTUAL PROMISES.

1. A promiſe for promiſe, or mutual promiſes to ſupport an action are a good conſideration, they muſt, however, both be made at the ſame time i—15

N.

NECESSARIES.

See INFANTS—HUSBAND AND WIFE —MARRIED WOMEN — OWNERS AND MASTERS OF SHIPS.

1. *A.*, *B.* and *C.* for themſelves and other members of a club enter into articles of agreement with *D.* to provide neceſſaries, &c. for the uſe of the club; *A.*, *B.* and *C.* are liable perſonally for the whole demand i—7 ii—356

2. A father is bound to provide neceſſaries for his own children: but a ſecond huſband cannot at law be compelled to maintain his wife's children by a former marriage ii—350

3. And if the ſecond huſband be a man of ſmall ſubſtance, and his wife's children, by the former marriage, have a competent proviſion to receive when they come of age, a promiſe by them to repay the father-in-law the expence of their maintenance is valid, and an action will lie thereon ii—350

4. But if a ſecond huſband receives his wife's children, by a former marriage, into his houſe, and they become part of his family, he ſhall be deemed to ſtand *loco parentis*, and liable to a contract made by his wife for their education, &c. ii—353

5. So, if a huſband, living in a ſtate of ſeparation from his wife, ſuffer his *own* children to reſide with their

mother, he is liable for neceſſaries furniſhed them ii—354

6. So, an action lies for neceſſaries found for a *baſtard* child, upon an expreſs promiſe by the putative father; and it is no defence, that he afterwards diſcovered that the child was not begotten by him ii—354

7. In an action for neceſſaries found for an apprentice, if the declaration ſtates that he is the apprentice of the defendant, the plaintiff muſt prove him to be ſo legally, and if the indentures be not properly ſtamped the plaintiff cannot recover ii—355

8. It being contrary to the 7 and 8 *W.* 3. *c* 4. for a candidate to furniſh proviſions to any voter after the *teſte* of the writ, an inn-keeper cannot recover againſt a candidate the amount of proviſions furniſhed to voters after that date, at his requeſt ii—356

NUDUM PACTUM.

1. A *nudum pactum*, or promiſe without conſideration is void i—2, 8, 13, 16

2. If a perſon gratuitouſly promiſes another a ſum of money, or perform any work, &c., no action lies for the non-performance of ſuch a promiſe i—16 ii—365, &c.

O.

OFFICE, RIGHT OF.

1. In what caſes the right to an office, or to the fees thereof, may be tried in action of *aſſumpſit*. *See* Money Had and Received, div. 19

OFFICES, SALE OF.

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2. So, no action will lie upon a contract reſpecting either the appointment to, or relinquiſhment or ſale of a public office ii—452 to 461

3. So, a contract for the ſale of the command of an *Eaſt India* ſhip, is void ii—461

4. So, a promiſe to procure a perſon to be rector of a donative church, with cure of ſouls, is void ii—464

5. So, a promiſe to pay a *per centage* for procuring a purchaſer of a place in the cuſtoms, is void ii—464

6. But, a promiſe by one of two candidates for the office of under-ſheriff, in conſideration that the other will deſiſt, is valid ii—465, 6

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1. If one of ſeveral overſeers promiſe to pay an apothecary for the cure, &c of a pauper, they are all jointly liable to be ſued i—397

2. But the law will not raiſe an *implied* promiſe by the overſeers, &c. of a pariſh where a pauper is ſettled, to reimburſe another pariſh in which the pauper happened to be before his final ſettlement, the expence of providing neceſſary medical aſſiſtance for the pauper i—397

3. Pariſh officers are bound to take care of caſual poor; and if a perſon, not a pariſh officer, takes care of a perſon who comes within that deſcription, and provides him with neceſſary medicines, &c. he having met with an accident there, they are liable to be ſued for the expence thereof i—398

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1. Owners are liable to pay for *repairs* done to their ſhip, by order of the captain, who is alſo liable i—331

2. If one joint owner conveys his moiety of a ſhip to his companion, by bill of ſale, which happens to be void by the ſtat. 26 *Geo.* 3. both of them ſtill remain liable for repairs, &c. i—331

3. Where

3. Where a ſhip was burnt by accident, in the ſhipwright's dock after the repairs were nearly finiſhed, the owner was held liable for the amount of repairs actually done i—331

4. The owners and maſter are alſo liable for *neceſſaries* ſupplied their ſhip 332

5. The owners are liable, though they may have let the ſhip to the maſter, if this fact be unknown to the tradeſman i—332

6 The neceſſaries, however, muſt appear to be reaſonable, fit, and proper for the occaſion i—33

7. But where it appears that the credit was given ſolely to the *owner*, the maſter is not liable i—334

8. So, where an *owner* ordered goods for the uſe of his ſhip, before the appointment of the maſter, he alone is liable i—33

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10. If one of ſeveral part owners contract for neceſſaries for the uſe of the ſhip, all of them are jointly liable i—338

11. But if the perſon ſupplying the neceſſaries did not know that there were other owners, he may ſue that one only i—338

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1. Money depoſited with a ſtakeholder, to be paid over to a perſon for his intereſt in ſoliciting the pardon of a man under ſentence of death, is not recoverable by action ii—12

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1. Of the parties to a contract, and their general liability; and who are competent to contract i—7

PARTNERS.

1. The nature and definition of a partnerſhip i—285

2. In order to conſtitute a partnerſhip, and to make a perſon liable as a partner, there muſt either be ſome agreement between him and the oſtenſible perſon to ſhare in the profits of the trade or he muſt have permitted his name or credit to have been held out to the public, as jointly anſwerable, though, in fact, no partnerſhip exiſts i—87. 293

3. So, a dormant or ſecret partner is anſwerable on all contracts made by his co-partner with *third perſons*, relative to the partnerſhip concern i—291. 293

4. But where a partner who retires from the concern, lends money to his co-partner upon an agreement to have legal intereſt, with an additional annuity for a certain term of years; this is not a continuation of the partnerſhip, even with reſpect to third perſons, provided there has been public notice of the diſſolution i—291

5. If a partner, who has withdrawn from the concern, omits to give notice thereof, he ſtill remains liable to third perſons who are ignorant of the fact i—293. 324

6. A partnerſhip may exiſt in a particular concern, without conſtituting a *general* partnerſhip, unleſs a repreſentation is made of a *general* partnerſhip i—294

7. In order, to conſtitute a partnerſhip in a particular purchaſe, there muſt be either a joint undertaking to pay, or an agreement to ſhare in the profit and loſs i—295

8. Therefore, where one perſon agrees to buy a quantity of goods, and to let others have a certain proportion of them, he alone is anſwerable; ſuch a tranſaction being conſidered a mere *ſub contract*, and not a partnerſhip i—298

9. So, where ſeveral perſons agreed to make an outfit, and each adventurer was to purchaſe a quantity of goods, and bring it into the common ſtock; the price of a parcel of goods ſo bought was held an individual debt which could not be recovered from the other adventurers i—306

10. But, a contract made by two partners to pay a certain ſum of money to a third perſon, equally out of their own *private caſh*, is a *joint contract*, and they muſt be jointly ſued upon it i—306

11. Where two perſons jointly carry on buſineſs as partners, but one only appears, and is known in the concern, and he is permitted to repreſent himſelf to the world as a *ſole* trader, it has been decided, that that one ſhall not be allowed to ſet up partnerſhip as a defence to an action brought againſt him only i—307

12. If one of ſeveral partners draws, accepts, or indorſes a bill or note, or enters into any other contract, not under ſeal, in the name of the partnerſhip firm, for any thing relating to the concern, all the partners are jointly liable thereon, if the party with whom the obligation is made has acted *bonâ fide* i—308

13. But, if a perſon, having dealings with one of ſeveral partners only, on his ſeparate account, draws a bill upon the firm, which is accepted by the individual partner, the other partners are liable only to a *bonâ fide* indorſee for a valuable conſideration i—308, 315

14. So, where two partners having contracted a debt prior to the admiſſion of a third, accept a bill in the name of the three, the third is only liable to a *bonâ fide* indorſee. i—311

15. So, an authority given to one partner, on the diſſolution of a partnerſhip, to receive all debts *owing to*, and to pay thoſe *owing from* the partnerſhip, does not authorize him to indorſe a bill of exchange, after the diſſolution, in the name of the firm, even for the partnerſhip debts i—315

16. So, where two partners give a joint bill of exchange for a partnerſhip demand, which is not paid when due, and the holder takes a ſeparate bill, or ſecurity from one of the partners, without the knowledge of the other, the latter is diſcharged i—318

17. Money lent to one partner, whilſt travelling on the partnerſhip buſineſs, in order to defray certain expences on the journey, may be recovered againſt all the partners i—318

18. So, where one of ſeveral partners receives money or goods of a third perſon, on the partnerſhip account, in order to be applied to a particular purpoſe; but, inſtead of doing ſo, wrongfully miſapplies ſuch money or goods to his own private uſe, all the partners are anſwerable i—319

19. So, if two perſons are in partnerſhip as attornies and conveyancers, and one of them receives money to be laid out on mortgage, but miſapplies it, the other is liable i—320

20. So, where one of two partners applied truſt money to the uſe of their trade, with the privity of the other, both are liable to be ſued for the money ſo miſapplied i—323

21. If one of ſeveral partners reſiding abroad, ſell goods which are to be ſmuggled from thence into *England*

England, where the other partners reſide; no action lies for the value of the goods, though the partners reſiding in *England* knew nothing of the particulars of the ſale i—323

22. One partner cannot bind his co-partner by *deed*, without an expreſs authority under ſeal i—324

23. When partners diſſolve their partnerſhip they ſhould ſend notice to all perſons who have dealt with them; notice in the gazette not being of itſelf ſufficient i—324

24. But, notice of diſſolution in the gazette is a ſufficient notice to all perſons who have had no previous dealings with the firm i—325

25. Upon a partnerſhip contract, all the partners, or their aſſignees, muſt *ſue* and be *ſued* i—326, 7

26. The action, however, muſt be brought at the ſuit of ſuch partners only as compoſed the firm at the time of making the contract i—327

27. With regard to ſurviving partners, it is a rule, that where one of ſeveral partners dies, an action upon a partnerſhip contract muſt be brought in the name of the ſurvivors only ii—327

28. One partner has in general no remedy at *law* againſt his co-partner, for anything relating to the partnerſhip concern, except upon an expreſs agreement made between them, their only remedy being in a court of equity i—328

29. But money which has been paid by one partner to another, before the bankruptcy of the latter, for the purpoſe of being paid over as his liquidated ſhare of a debt to their joint creditor, if it be not ſo paid, is proveable as an individual debt under the commiſſion of his co-partner i—328

30. So, if one of ſeveral partners, in a particular concern, pays a joint debt, he may maintain an action againſt one of the other partners for his and the other partners' proportion, unleſs that partner plead in abatement i—328

31. But where money is paid by one partner, for himſelf and co-partners, upon an illegal contract, he cannot recover the reſpective proportions of the other partners i—329

32. One partner may maintain an action againſt his co-partner, for money received on account of the ſeparate uſe of the former, but wrongfully carried to the partnerſhip accouut i—329

33. So, one partner may ſue his co-partner at law for the balance of an account ſtated between them i—329—ii—206

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1. Of the ſtatute relating to party-walls, and the perſons liable to contribute, as alſo as the remedy for recovering a moiety of the expence of building the ſame ii—191 to 201

PASSAGE MONEY.

1. Where a ſhip is taken by the enemy, and proceedings are inſtituted in the Court of Admiralty, the maſter is not entitled to paſſage-money *pro ratâ itineris* for carrying paſſengers and their luggage, pending the ſuit in the admiralty i—364

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See INVENTION.

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1. Of the diſtinction between a penalty and of ſtipulated damages, and what words will amount to the one or the other ii—537 to 546

2. In

2. In the caſe of a penalty, the plaintiff has his election to proceed either for the penalty or for general damages; but having once made his election, and recovered the penalty, he cannot bring any action to recover farther ſatisfaction ii—147

3. But a party cannot, by tendering the penalty, be let off from a ſpecific performance of the contract ii—547

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1. A phyſician cannot maintain an action for his fees ii—377

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1. Money fairly won at play, if under 10*l.* is recoverable by action of *aſſumpſit* ii—507

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1. If exorbitant and illegal intereſt be taken upon a pledge of goods, it may be recovered back by action of *indebitatus aſſumpſit* for money had and received ii—115

2. Where money is lent on a pledge, the lender may recover it by action of *indebitatus aſſumpſit*, for ſo much money lent and advanced, unleſs there is an agreement to ſtand to the pledge only ii—141

POLICIES OF INSURANCE.

1. Wager policies are void by ſtatute 19 *Geo* 2. c. 37. i—44

2 So, all re aſſurances on ſhips or goods are void by the ſame ſtatute, except in the caſes of bankruptcy, or death of the aſſurer i—44

3. Policies of aſſurance made by private perſons in partnerſhip, are alſo void i—44

PREMIUMS OF INSURANCE.

1. In what caſes premiums of inſurance are recoverable back. *See* MONEY HAD AND RECEIVED UPON MARINE INSURANCES.

1. Re-aſſurances being declared illegal, by ſtatute 19 *Geo.* 2 c. 37. the underwriters cannot recover the premiums thereof from the broker, though he has actually received them from his principal, and paſſed the ſame in account with the underwriters; he having received notice from the aſſignees of the inſured not to pay them over ii—126

POST CHAISES.

1. If a perſon hire a poſt-chaiſe, and is permitted to go into it, and to put on his luggage, the poſtmaſter muſt proceed on the journey, if his fare be tendered to him ii—393

PRINCIPAL, FACTOR, AND AGENT.

See AGENTS FOR GOVERNMENT—AUCTIONEER—MASTER & SERVANT—MONEY HAD AND RECEIVED.

1. The general duty of a factor i—234

2. His power is either general or limited: how he muſt act in either caſe i—236

3. A factor or agent cannot delegate his authority to another; and all contracts entered into by him ſhould regularly be made in the name of his principal i—237

4. A factor or agent having goods of his principal to ſell, cannot bind or affect the property of them, by tortiouſly pledging, or otherwiſe diſpoſing of them, in ſatisfaction or ſecurity for his own debt i—237

5. But a factor who has a lien on the goods of his principal, may deliver them over to a third perſon as a ſecu-

a ſecurity, with notice of the lien i—237

6. If goods are conſigned to a factor or agent, who afterwards becomes bankrupt, and the goods remain in ſpecie in his hands, at the time of his bankruptcy, the aſſignees muſt deliver them over to the principal i—237

7. But if the goods are ſold and turned into money, the principal muſt come in as a creditor under the commiſſion i—238

8. Though if the goods happen to have been ſold on credit, and the money is not paid at the time of the bankruptcy, or death of the broker or agent, the aſſignees or executors muſt pay it over to the principal, after deducting the factor's commiſſion i—238

9. A maſter is liable upon a note drawn in his name by his ſervant or apprentice, if he has given him an authority to draw notes or bills in a ſimilar way before i—239

10. So, a principal is bound by the acts of a general agent; but an agent under a limited and circumſcribed authority, cannot bind his principal by any act which exceeds his authority i—240

11. But if an agent, acting under a limited authority in the purchaſe of goods, has any diſcretion given him to exceed the ſum mentioned by his principal, and he does exceed that ſum, the principal is liable i—241, 2

12. So, the acknowledgment of an agent employed to buy goods, that he has received them, is evidence to bind the principal i—242

13. A principal is, in general, reſponſible for the miſrepreſentation or deceit of his agent i—242

14. If a perſon buys goods of a factor or agent, he may pay him the money for them, and his receipt will be a diſcharge; unleſs he receives previous notice from the principal not to pay the factor; in which caſe he would not be juſtified in afterwards paying the money to him i—243

15. But if the factor, at the time of the ſale of goods, &c. be indebted to the buyer, the latter may ſet off any demand he may have on the factor, againſt the demand of the principal, if he was ignorant of his ſelling as factor i—243

16. Payment of a debt to an agent of an attorney, is not a valid payment, but payment to the attorney himſelf is i—244

7. If a ſervant receives a bill in payment of a debt due to his maſter, inſtead of money, and the maſter diſſents from it, this is not a valid payment i—244

18. If a ſon, having a general authority to receive and pay money for his father, receive money due to his father, and ſigns a receipt for the ſame, and afterwards gives away the money to a ſtranger, the debtor is diſcharged, and the father can only recover it back from the donee i—245

19. If a perſon takes the ſecurity of the agent himſelf, unknown to his principal, and gives the agent a receipt, purporting to be in payment, and on the production of which the principal deals differently with his agent, ſuppoſing the debt to have been paid, the principal is diſcharged although the ſecurity fail i—246

20. If a factor to one beyond ſea buys and ſells goods for his principal, the factor may ſue and be ſued in his own name i—247

21. So, where a factor or agent in this country ſells goods of his principal in his own name, he, or his principal may bring an action for the price i—247

22. But an agent is not liable to be ſued upon contracts made on behalf of his principal, where the name of the principal is diſcloſed at the time of making the contract i—248

23. So,

23. So, where money is paid to an agent by miſtake on account of his principal, and the agent has *actually* paid it over before notice, he is diſcharged; but not otherwiſe; and the principal alone is liable i—250 ii—23

24. The mere circumſtance of, however, paſſing ſuch money in account, or making a reſt, without any new credit given, freſh bills accepted, or further ſum advanced for the principal, will not diſcharge the agent ii—250

25. Where money is paid to an agent or ſervant, on account of his principal, to be laid out for a particular purpoſe, but the agent miſapplies the money, the perſon paying it has his remedy either againſt the principal or agent, at his election i—251

26. Money paid by an agent, by miſtake or otherwiſe, may be recovered back either by the principal, or agent, in an action of *indebitatus aſſumpſit* for money had and received ii—24

27. Though, in general, an agent is not liable to be ſued upon contracts made by him on behalf of his principal, yet if he make an abſolute engagement to perform it, *perſonally*, he may be ſued thereon i—252

28. Upon goods ſold under a *del credere* commiſſion, the principal may ſue either the factor or the buyer, at his election i—253

29. Where a broker buys goods for his principal, and agrees, for a certain *per centage*, to indemnify him from any loſs on the re-ſale of them; if the principal has a fair opportunity of ſelling the goods to advantage, but neglects to avail himſelf of it, the broker is diſcharged, though the principal afterwards ſell them at a loſs i—259

30. An action of *aſſumpſit* lies, at the ſuit of the principal againſt his factor or agent for not rendering an account: but if the accounts be long and intricate, the proper remedy is by action of account i—261

31. So, if a broker receive money belonging to his principal, the latter may recover it by action of *indebitatus aſſumpſit* i—261 ii—22

32. So, where *A.* appointed *B.* his deputy to an office, and it was agreed between them that *A.* ſhould account for all fees, &c. according to the table of fees belonging to ſuch office, and pay over to *B.* three-fourth parts thereof, and retain the other fourth part for himſelf: *A.* is bound to anſwer for all fees received in the office, whether included in the table or not i—261

33. If a merchant directs his factor or correſpondent to inſure, which he neglects doing, he is liable to an action for ſuch neglect of duty i—262

34. But in order to maintain ſuch an action, the principal muſt ſhow that the agent was guilty either of a breach of *poſitive orders*, *groſs negligence*, or *fraud* i—263, 4

35. Where a banker in *London* receives bills from his correſpondent in the country for payment, and he accepts a banker's check in payment, he is not liable, though the check is afterwards diſhonoured i—265

36. If an officer on foreign ſervice, ſends in his reſignation, and directs the agent of the regiment to ſell his commiſſion, the agent muſt take care to ſecure to him the purchaſe money, or he will be perſonally liable i—266

37. *A.* entruſted *B.* with goods to ſell in *India*, agreeing to take back what *B.* ſhould not be able to ſell: *B.* not being able to ſell them before he came from that country,

country, left the goods with a perſon to diſpoſe of there, directing him to remit the money to *A.* in *England*. *B.* is not liable to an action of trover i—267

38. A factor has a lien on goods conſigned to him, not only for his general balance, but for incidental charges: this lien, however, only remains ſo long as the agent retains poſſeſſion of the goods, &c. i—267

39. So this general lien does not attach unleſs they come into the actual poſſeſſion of the agent i—268

40. So, the general right of *lien* may be controlled by agreement of the parties; as if *A.* depoſit goods with *B.* for ſale, and *B.* promiſe to pay the proceeds thereof to *A.* when ſold, *B.* has no lien on ſuch goods (if not ſold) for his general balance i—267, 8

41. So, where a trader, after a ſecret act of bankruptcy, conſigns goods to his factor, who advances money thereon, the latter has no lien on ſuch goods for his general balance, but muſt deliver them up to the aſſignees i—268

42. So, if *A.* employs a factor to ſell goods, he has no lien upon them in reſpect of any debt due for other goods ſold by him to *A.* on account of another employer i—268

43. But, the aſſignee of a policy of aſſurance on goods, who becomes ſuch by the indorſement to him of the bill of lading of the goods after having directed his correſpondent to make the inſurance, takes it ſubject to the lien of the correſpondent. The broker, however, has no *ſub-lien* for his general balance with the correſpondents i—270

44. So, where a principal gives notice to his factor of an intended conſignment to him of a ſhip for ſale, and, in conſequence, draws bills on the factor, which he accepts; and afterwards the principal dies, and his executors deliver up the ſhip to the factor for ſale, and he ſells the ſame purſuant to the teſtator's orders, the factor has a lien upon the proceeds for the money diſburſed by him, and alſo for the amount of his acceptances, though not then due i—270

45. A factor is entitled to bring an action for his factorage, if the principal refuſe to come to an account, and the factor has veſted the produce of his adventure in other goods i—271

46. But a factor or agent ſhall not have any ſalary allowed him where he acts againſt the intereſt of his principal i—271

47. So, a broker who contracts with others for the ſale of ſtock at a future day, by the authority of his principal, who afterwards refuſes to make good the bargain, cannot, by paying the differences to ſuch third perſons, maintain an action againſt his principal for the recovery thereof; ſuch contracts being illegal i—271

PRINCIPAL AND SURETY.

See MONEY PAID.

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1. No action will lie for the ſale of immoral and libellous prints ii—244

PRIZE-MONEY.

1. After ſentence of condemnation has been pronounced in the Court of Admiralty, in favour of the captors, and the property captured has been ſold and converted into money, an action lies at the ſuit of the captors againſt the agent who has received the money ii—136

2. So, the captor of a prize may legally aſſign his ſhare therein before condemnation;

condemnation; and thereby entitle the aſſignee to recover it againſt the prize agent after condemnation and ſale ii—137

PROCTORS.

1. Fees payable to proctors and other officers for buſineſs done by them in the ſpiritual or eccleſiaſtical courts, are recoverable by action of *indebitatus aſſumpſit*, or quantum meruit ii—388

PROCURING AN ACT TO BE DONE.

See SERVICES AND WORKS.

PROMISES.

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1. Promiſes are either expreſs or implied i—3
2. Promiſe for promiſe, or mutual promiſes, are valid i—15
3. A promiſe muſt be made upon a good conſideration i—2, 8, &c.

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1. A promiſſory note ſhould be founded on a good conſideration: and in what caſes it is void for want thereof i—9, 12, 13

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1. Contracts entered into with a view to future fornication are illegal and void i—31
2. But an engagement or promiſe by way of reparation for paſt ſeduction, is valid i—32
3. No action will lie for the rent of lodgings let expreſsly for purpoſes of proſtitution ii—522
4. But, for work done for a proſtitute, ſuch as waſhing and getting up of expenſive articles of dreſs, to enable her to appear in public, an action lies i—32

PROVING A DEBT, &c.

1. A promiſe to pay a debt either in conſideration of the creditor's proving it to be due, upon oath or otherwiſe, or in conſideration of the debtor's failing to prove it paid, is valid ii—449 to 451

R.

RE-ASSURANCE.

See PREMIUMS.

1. Premiums for effecting polices of re-aſſurance cannot be recovered by action; ſuch inſurances being illegal ii—126

RECEIVER-GENERAL OF THE LAND-TAX OF A COUNTY.

1. An action of *indebitatus aſſumpſit* lies by the leſſee of land againſt the receiver-general of the land-tax of a county, to recover a ſum of money aſſeſſed by a jury as a compenſation for the uſe of plaintiff's land, which had been taken for the public ſervice under the ſtat. 4, *Geo.* 3. ii—23

RECOMMENDING CUSTOMERS.

1. An agreement to pay ſo much in the pound for recommending cuſtomers to purchaſe goods is void i—38

RECORD.

See ASSUMPSIT.

REMEDY.

1. Of the different remedies in caſe of breach of contract, and of the party's right of election ii—549, 557, &c.

REPAIRS.

See LANDLORD AND TENANT—MASTERS OF SHIPS—OWNERS OF SHIPS.

RENT.

See MONEY HAD AND RECEIVED—USE AND OCCUPATION.

REPRESENTATION.

1. Fraudulent repreſentation of material circumſtances vitiates all contracts i—38

RESCINDING OF A CONTRACT.

See BANKRUPT—MONEY HAD AND RECEIVED.

1. Where goods are actually ſold and delivered, the contract cannot be reſcinded, or the goods reſtored to the ſeller by agreement between him and the buyer upon the inſolvency and bankruptcy of the latter i—462

2. In what caſes a contract can or cannot be reſcinded ii—52 to 85

RESPONDENTIA BOND.

1. An action of *indebitatus aſſumpſit* for money had and received will lie at the ſuit of the aſſignee of a reſpondentia bond againſt the obligor, who undertakes by an indorſement thereon, to pay the money mentioned in the bond to any aſſignee ii—10

RESTRAINT.

See MARRIAGE—TRADE.

REVENUE OFFICERS.

See MONEY HAD AND RECEIVED.

S.

SALES.

See AUCTION—FRAUDS, STATUTE OF—HOUSES—MONEY HAD AND RECEIVED—STAMPS—WARRANTY.

1. Of the general rules relating to contracts for the ſale of goods ii—210 to 213

2. After earneſt given upon the ſale of goods, the vendor cannot ſell them to another without default of the vendee ii—213

3. But earneſt given does not alter the property of the goods contracted for, but only binds the bargain ii—213, 14, 231

4. Whatever ſum is given as earneſt, or as a depoſit, is to be deemed part of the purchaſe money, unleſs there be an expreſs ſtipulation to the contrary ii—215

5. Where goods are ſold conditionally, *viz.*, "if the buyer like or diſlike them upon view," the buyer muſt determine as ſoon as he has firſt ſeen them: but if he has till a certain day, he may declare his liking before the day, and alter it *at* the day ii—215

6. So, if cattle or goods are ſold upon a contract that the vendee ſhall uſe them a *certain time* on trial, he may retain them the whole time, although he may have expreſſed his diſlike to them long before the expiration of the time allowed for the trial ii—215

7. If cattle or goods are ſold upon a warranty which turns out to be untrue, but the buyer does not return them, he cannot ſet up the breach of warranty in an action for the price, though he may ſhow the true value, &c. ii—282, 3, 363

8. When goods are put up to ſale by public auction, and a bidding is made, the bidder may retract his bidding at any time before the lot is knocked down to him ii—217

9. But if goods are fairly ſold at an auction, and the buyer refuſes to accept and pay for them, he is liable either to an action for damages, or to an action of *indebitatus aſſumpſit* for goods ſold ii—218, 220

10. If, however, the owner of the goods ſecretly employs puffers to bid, the contract is void i—37, 257 ii—218

11. If

11. If upon the ſale of goods no time of payment is mentioned, the buyer muſt pay for them upon delivery ii—221

12. So, upon a ſale of goods for ready money, the price muſt be paid upon delivery: though if the goods are delivered without payment, and the ſeller is indebted to the buyer, the latter is not obliged to pay for the goods in ſpecie, but may ſet-off his debt againſt the amount thereof ii—222

13. Where a certain quaintty of goods are bought at ſo much *per* ton or hundred weight, if the contract be entire, the buyer is not bound to pay for them until the whole are delivered ii—223, 231

14. An agreement to take a ſpecific parcel of copper money, in payment of goods, is binding upon the ſeller, though it turn out to be counterfeit, if the buyer is ignorant of this circumſtance, and is not guilty of any fraud ii—223

15. If a tradeſman gives credit for goods at the time of ſale, no action lies till that period is expired: but if the time of credit is given after the ſale, or if the buyer has not bought the goods *bonâ fide*, the tradeſman may ſue for his debt immediately ii—223

16. Goods ſold upon a contract that the vendee ſhall pay for them in *three* months by a bill at *two* months, is a credit of *five* months; and no action of *indebitatus aſſumpſit* for goods ſold and delivered lies till the expiration of the five months. But if the vendee refuſes to give the bill at the end of the three months, he is liable to an action of damages for breach of his contract ii—224

17. So, if goods are ſold upon a contract to pay for them by a bill to be drawn and payable at ſo many months date, the vendor muſt draw the bill and preſent it to the vendee, even though the latter may have diſhonoured many of his acceptances between the time of ſale and the period for drawing the bill ii—229

18. If upon a bargain and ſale, earneſt is paid, or a note in writing ſigned, the property is veſted in the vendee ii—231

19. When a bargain and ſale is complete, and by the contract the money is to be paid before the delivery of the goods, or if there be no agreement as to the time of payment, and the vendee refuſes to accept them, an action of *indebitatus aſſumpſit* lies for goods bargained and ſold ii—230

20. If *A.* promiſe *B.* 20*l.* on delivery of twenty quarters of corn, no action lies for the 20*l.* until the delivery of the whole twenty quarters ii—231

21. So, where the vendor, after permitting the vendee's ſervant to pack part of the goods in clothes furniſhed by the vendee, declares they ſhall not go off the premiſes till they are paid for, and he accordingly keeps them, no action for goods ſold and delivered will lie ii—231

22. Where goods are ordered to be ſent to the vendee by a carrier, without naming any particular one, or to be ſent by a particular mode of conveyance, an action for goods ſold and delivered lies as ſoon as the goods are delivered to the proper carrier ii—231 to 236

23. If *A.* and *B.* come to a ſhop, and *A.* ſays, let *B.* have ſo much cloth and I will pay for it, or ſee you paid, *A.* is the original debtor, and he alone is liable ii—237

24. But if the promiſe amounts to a collateral engagement only, *viz.*, to pay for the goods if *B.* does not, in ſuch caſe *A.* is not liable, unleſs the promiſe be reduced into writing, and *B.* has made default ii—237

25. If a contract for the ſale of contraband or prohibited goods be made in this country, it is void, and no action lies thereon; but if the contract

contract and delivery are complete abroad; and the seller does not assist in smuggling them here, such a contract is valid, and an action will lie thereon for the price of the goods ii—239 to 244

26. No action lies upon a contract for the sale of obscene and libellous prints ii—244

SALVAGE OF SHIP OR GOODS.

1. If a person, by his own labour, preserves goods which have been either abandoned, or in danger at sea, he is entitled to retain possession of the goods until proper compensation is made to him for his trouble: or he may proceed either in the mode prescribed by the statute, or bring an action of *assumpsit* upon a *quantum meruit* ii—394 to 400

SCOTCH BOND.

1. The assignee of a *Scotch* bond may bring an action of *assumpsit* thereon in his own name; such an instrument being assignable by the law of *Scotland* ii—508

SEAMEN's WAGES.

1. No master of a ship can legally take any seaman beyond the seas, or on the coasting trade, without first entering into an agreement in writing, declaring the rate of wages, &c. i—365 to 369

2. Every master who shall knowingly hire any seaman, who has deserted, shall forfeit 100*l*. i—366

3. No master can legally hire any seamen in the *West Indies* for more than after the rate of double monthly wages contracted for in *Great Britain*, without a certificate, &c. i—366

4. When a written agreement is made it becomes the only evidence of the contract between the parties, and nothing can be recovered beyond what is therein expressed i—369, 372

5. A promise to pay a seaman an extra sum for extraordinary service, at the time the ship is in distress, is void i—369

6. But where a ship stays in a foreign port a considerable length of time to refit, &c, and in order to prevent the seamen from going away, the captain agrees to pay them so much *per* month whilst she is there detained, this is valid i—369

7. If a seaman *actually* performs his duty; or if he is prevented from doing it either by illness, or the misconduct of the master, and the ship earns her freight, he is entitled to be paid his wages i—370

8. If the owners do not send the ship her intended voyage, the seamen are entitled to be paid for the time they actually serve on board, and may maintain an action for any special damage they may sustain i—372

9. In general, however, wages are not payable unless the ship earns her freight i—372, 380

10. Of the payment of wages on outward and homeward bound voyages i—372, &c.

11. Where a seaman is hired by the month, and the ship is detained in a foreign port by an embargo or hostile detention; but he remains with the ship, which afterwards performs her voyage, and earns her freight, the seaman is entitled to his full wages, including the period of the ship's detention i—373, &c.

12. So, in the case of capture and recapture, if the ship earns her freight the seamen are entitled to their wages i—375

13. If a seaman is impressed out of a merchant ship, or voluntarily enters into the King's service, he is entitled to a proportion of his wages i—376

14. If a seaman dies during the voyage, and his wages are payable monthly, his representatives are entitled

titled to a proportion thereof to the time of his death: but if the contract be for an entire ſum, and made payable under a proviſo that he continues with the ſhip to the end of the voyage, the repreſentatives are not entitled to any part of the ſum, unleſs there be a cuſtom or uſage to pay a proportion i—377

15. Though the captain of a ſhip is bound by ſtat. 37 *Geo.* 3. *c.* 73. to account upon oath for the wages due to a deceaſed ſeaman, and to pay the arrears into *Greenwich Hoſpital*, the repreſentatives may nevertheleſs ſue the captain for any wages which may be due to the deceaſed beyond the ſum ſo paid in i—378

16. If a ſhip be unable to perform her voyage in conſequence of her not being ſea-worthy, the ſailors cannot ſue for wages for any part of the voyage: but their remedy is by ſpecial action on the caſe againſt the owners for damages i—380

17. If any part of the cargo be embezzled or damaged by fraud or negligence of the ſeamen, the maſter and owners may deduct the amount of ſuch embezzlement or damage from the wages of the *ſeamen by whoſe miſconduct* the injury has happened i—381

18. But, where ſuch an injury happens, and it cannot be aſcertained by whom it was done, no deduction can be made from the wages of any particular ſeaman i—382

19. Deſertion from the ſhip is a forfeiture of all wages previouſly earned i—384

20. So, wages are forfeited if the ſailor refuſes to aſſiſt the maſter in defending the ſhip againſt the attack of pirates, &c. i—386

21. So, neglect of duty, diſobedience of orders, or habitual drunkenneſs, are cauſes of forfeiture of wages i—386, 7

22. But where a ſeaman being put on ſhore, ſtaid till the next morning in order to get victuals, &c., and then offered to go on board, but the captain refuſed to receive him, this was held not to amount to deſertion i—387

23. Of the time and place of payment of wages to ſeamen engaged in the *Weſt India* and ſlave trades, and alſo in the coaſting trade, and on other voyages, &c. i—388 to 391

24. Seamen have a threefold remedy for the recovery of their wages, *viz.*, againſt the ſhip, the owners, and the maſter i—391 to 393

25. In the fiſhing trade, the ſeamen uſually ſerve under an engagement to receive a certain proportion of the profits of the adventure i—393

SECURITIES.

1. If the obligee of a bond promiſe to deliver it up on payment of the principal, but afterwards refuſes to do ſo, he is liable to an action for breach of his promiſe ii—348

2. So, where arbitrators are about to award that *A.* ſhall deliver up to *B.* two bonds to be cancelled, but in conſideration that they will leave them out of the award, *A.* undertakes to deliver them up to *B.*; he is liable to an action on this undertaking, if *he refuſes* to deliver up the bond ii—348

3. So, an action of *aſſumpſit* will lie upon a promiſe to pay money in conſideration of giving up ſecurities ii—448

SEDUCTION.

1. Contracts by way of reparation for paſt ſeduction are valid i—32

2. But a contract for future cohabitation is illegal i—31

SERVANT.

See MASTER AND SERVANT.

SERVICES AND WORKS.

See CARPENTERS AND BUILDERS—CLERGYMEN—SALVAGE—SURVEYORS—SURGEONS.

1. Where

1. Where a perſon is employed to do any work for another, under an agreement to be paid a particular ſum of money, it may be recovered by action of *indebitatus aſſumpſit*, as ſoon as the work is finiſhed; but if there be no expreſs agreement as to price he may maintain an action of *aſſumpſit* on a *quantum meruit*, for ſo much as he is fairly and reaſonably entitled to for the work ii—358

2. If a perſon is employed to do any buſineſs for another, and does it in an unſkilful and improper manner, he is liable to an action of *aſſumpſit* for damages ii—358

3. So, where one man engages either to ſerve or employ another for hire, but afterwards refuſes ſo to do, he his liable to the ſame kind of action ii—358

4. If a man promiſe to build a mill or houſe within a certain time, but fails in doing it, no action lies upon this promiſe, unleſs there be a conſideration alleged for the doing it ii—365

5. In an action of *aſſumpſit* for ſervices and works, the defendant may ſhow that the work was improperly done, and that the plaintiff is not entitled to ſo much as he has charged ii—361, 372, 384

6. A promiſe to pay a ſum of money to another, in conſideration of his procuring a particular purchaſe, or the enjoyment of a houſe, &c., is valid; and when the purchaſe, &c. are completed, an action of *indebitatus aſſumpſit* will lie for the amount of the ſum promiſed ii—400 to 403

7. A promiſe to pay money to another, in conſideration of his procuring a pardon, is not recoverable by action ii—403

8. An agreement to pay a *per centage* upon the day on which any *money* ſhould be received by the defendant through the means of the plaintiff's information, does not entitle the plaintiff to the *per centage* upon the transfer of *bank ſtock* ii—404

9. No action lies for ſervices which have been performed voluntarily, but with a view to be rewarded by a legacy ii—406, 7

SET-OFF.

See ASSUMPSIT.

SHERIFFS AND THEIR OFFICERS.

See MONEY HAD AND RECEIVED.

1. A promiſe made to a ſheriff or gaoler to pay him a ſum of money if he will permit his priſoner to eſcape, or go at large, is void i—34, 35. ii—435

2. Or if he will accept bail, or cauſe goods to be found by inquiſition, &c. i—35

3. But a promiſe to indemnify a ſheriff in doing a lawful act is valid i—35

4. An agreement with a ſheriff's officer to put in bail at the return of the writ, is void by ſtat. 23 *Hen.* 6. *c.* 9. i—39, 40 ii—435

5. If a ſheriff or gaoler voluntarily ſuffer a priſoner to eſcape, for which he is obliged to pay the debt, he cannot recover it againſt the priſoner ii—203

6. But if a ſheriff's officer diſcharge a defendant arreſted on meſne proceſs, on payment of the ſworn to, and is afterwards obliged to pay the remainder of the debt, he may recover it from the defendant by action of *indebitatus aſſumpſit* for money paid ii—203

SHIP.

See FREIGHT—OWNERS—MASTERS OF SHIPS.

SIMONY.

1. All ſimonical contracts are void i—33 ii—464

SMUGGLING.

See SALES.

1. All contracts made in contravention of the revenue laws of this

country, are void i—44
ii—239 to 244

SON.

See FATHER AND SON.

STAKEHOLDER.

See MONEY HAD AND RECEIVED.

1. If money be depoſited in the hands of a ſtakeholder for the purpoſe of being paid over to the winner on the event of legal wager, the winner may recover it of the ſtakeholder by action of *indebitatus aſſumpſit* for money had and received ii—24

2. In what caſes money depoſited with a ſtakeholder upon an *illegal contract* or *wager*, can or cannot be recovered ii—124, &c.

STATUTE OF FRAUDS.

See FRAUDS.

STAGE-COACHES.

1. If a perſon pays the whole fare of a ſtage-coach, he may take his place therein at any part of the journey, but not ſo if he make a depoſit of half the fare only ii—392, 3

2. The proprietors of a mail-coach are anſwerable for any injury happening to a paſſenger through the miſconduct of their driver ii—393

STAGE PERFORMERS.

1. No action will lie upon an agreement to dance at a theatre which is not licenſed as required by the ſtat. 10 *Geo.* 2. *c.* 28. ii—389, 390

STAMPS.

1. Of the ſtamp duties payable on different contracts, agreements, bills, notes, &c. i—130 to 137

2. An agreement made at ſea does not require to be ſtamped i—137

3. But if an agreement be executed in a foreign country, and by the laws of that country a ſtamp is required, it is void unleſs ſtamped agreeably to the ſtamp laws of that country i—138

4. A mere written acknowledgment of a debt need not be ſtamped i—139, 140

5. If there be two agreements on one piece of paper, there muſt be diſtinct and ſeparate ſtamps i—140

6. When a bill of exchange, or written agreement have been once executed by the parties, any ſubſequent alteration therein will require a new ſtamp i—140

7. Upon the exemption made in the ſtatute relating to the ſale of goods, it has been determined that an agreement to indemnify from any loſs on the re-ſale of goods purchaſed by a broker for his principal, need not be ſtamped i—141

8. But an agreement between merchants that one ſhall take a ſhare in the out-fit of a ſhip, &c., muſt be ſtamped i—142

9. So, an agreement for the Sale of hops growing, muſt be ſtamped i—143

10. So, an agreement for the making of ſpindles, &c. muſt be ſtamped i—144

11. Upon *the clauſe of exemption* of letters paſſing by the poſt between merchants and others, it has been determined, that a letter written by a ſon on behalf of his mother, who was in trade, to a tradeſman, thereby undertaking to pay a debt of his mother, which had been contracted in the courſe of buſineſs, is exempt from the ſtamp duty. i—145

STIPULATED DAMAGES.

See PENALTY.

STOCK.

See MONEY HAD AND RECEIVED—MONEY LENT—STOCK-JOBBING.

STOCKING-JOBBING

1. All contracts in the nature of wagers, putts, refuſals, &c. relating to any public ſtock or for buying and

selling any stock of which the parties are not possessed, or for paying the differences upon stocking-jobbing transactions, are wholly void by the stat. 7 *Geo.* 2. *c.* 8 ii - 245, &c.

2. Upon the 6th section of this statute, it has been determined, that in an action for damages for refusing to accept stock *bonâ fide* purchased, the plaintiff must prove an actual transfer of the stock to another person before the commencement of the action ii—250, 256, 7

3. So, in an action upon a contract for not accepting stock agreed to be transferred on request, the plaintiff must prove either an actual tender of the stock to the defendant, and his refusal, or that he waited at the bank till the close of the books on the day on which the transfer was to be made ii--256, 7

4. Upon the 8th section it has been decided, that if *A.* being possessed of stock, empowers *B.*, at his request and for his own benefit, to sell the same, for which *B.* agrees to transfer the same quantity to *A.* at the next opening; this is a valid agreement, though *B.* was not possessed of any stock at the time of the contract ii—260

5. How the damages for breach of contract in not replacing stock are to be estimated ii—262, 250, 7

6. A bill drawn by a broker upon, and accepted by his principal, for the amount of differences paid on stock jobbing transactions, is void i—43

SURGEONS AND APOTHECARIES.

1. A surgeon or apothecary may maintain an action of *assumpsit* for labour and attendance, as also as for medicines: but if a surgeon delivers a bill to his patient, and leaves a blank for his charge for attendance, and the patient pays a certain sum on that account, the surgeon is bound by the sum so paid ii - 370

2. It has been held to be a good defence to an action by an apothecary for his bill of charges, that he treated his patient ignorantly and improperly ii - 372

3. So, a surgeon or apothecary is liable to an action of damages for negligence in the treatment of his patient ii—373

SURVEYORS.

1. A surveyor is entitled to a reasonable compensation for his labour, but he is not entitled to estimate it by the money laid out by his employer, in finishing his building ii—396, 70

SOLICITORS.

See ATTORNIES.

SUTLERS.

1. Two sutlers of a regiment, who as such were entitled to certain daily forage of oats and hay for horses, entered into an agreement with the person supplying the king's magazine, that he should allow them 9½d, by ration, for every ration to which they should be entitled and which they should leave in the magazine for his use; such an agreement was held to be void i—37

SURETY.

See MONEY PAID.

T.

THIRD PERSON.

See FRAUDS, STATUTE OF.

1. In what cases a consideration coming from a third person will support a promise i—27

TENANT.

See LANDLORD AND TENANT.

TITHES.

1. An action of *indebitatus aſſumpſit* lies for tithes bargained and ſold ii—531

2. So, this form of action lies for a compoſition in lieu of tithes ii—531

TITLE.

1. In what caſes a title to an office, or to fees, in reſpect of an office, may be tried in an action of *aſſumpſit* ii—132, &c.

TRADE.

1. Contracts which bind any to a total reſtraint of trade, is illegal ii—467 to 480

2. But if a man, for a good conſideration, reſtrains himſelf from the exerciſe of his trade in a particular place, it is lawful ii—467 to 480

TRADING.

1. All trading with the ſubjects of an enemy's country, without the king's licence, is illegal i—36

TREATING VOTERS AT ELECTIONS.

1. A contract with a candidate for furniſhing proviſions for voters, is illegal ii—356

TRUSTEES.

1. A breach of truſt, in ſome inſtances, may be the ground of an action of *aſſumpſit*; as where a truſtee wrongfully applies truſt-money to his own uſe, an action of *indebitatus aſſumpſit* will lie for money had and received i—404

2. But truſtees, by ſubmitting matters of truſt to arbitration, do not make themſelves *perſonally* liable, except ſo far as they have effects of the truſt-eſtate i—404

TRUST PROPERTY.

1. Property which a bankrupt holds merely as a truſtee, does not paſs under the general aſſignment to his aſſignees i—409

U.

VOLUNTARY PAYMENTS.

See MONEY HAD AND RECEIVED—MONEY PAID.

USE AND OCCUPATION.

1. By ſtat. 11 *Geo.* 2. c. 19. an action of *aſſumpſit* will lie for uſe and occupation of lands, houſes, &c. either upon an *expreſs* or *implied* promiſe ii—510

2. But this form of action does not lie, if there be a leaſe under ſeal ii—511

3. Wherever a tenant occupies and enjoys premiſes by permiſſion of the owner, he is liable to be ſued in this form of action upon a *quantum meruit*; as if a landlord conveys his title and intereſt of lands or houſes in the occupation of a tenant, either by way of purchaſe, mortgage, or grant of an annuity, the tenant is liable to be ſued in this form of action, at the ſuit of the purchaſer, mortgagor, or grantee, for rent accruing due in their time, even after recovery in ejectment, for ſo much as ſhall be in arrear, previous to the day of the demiſe laid in the declaration in ejectment ii—511, 512

4. So, if *A.* agrees to let lands to *B.*, who permits *C.* to occupy them, *A.* may recover the arrears of rent againſt *B.* in this form of action ii—513

5. So, upon an *expreſs* to pay ſo much per week for a houſe, in conſideration that the landlord would permit the tenant to occupy the ſame,

ſame, the tenant is liable for the rent in this form of action, though he never actually occupied the houſe, or took poſſeſſion of it ii—514

6. So, if there be an agreement under ſeal to demiſe a houſe, by words not amounting to an actual demiſe, and the tenant occupies the premiſes, the landlord may ſue in this form of action for the rent in arrear ii—515

7. But if a tenant agrees to pay a ſum of money annually, over and above the rent reſerved for and towards the *good will*, this cannot be recovered under a count for uſe and occupation; but the landlord muſt declare ſpecially on the promiſe ii—515

8. So, this form of action will not lie to try a title to premiſes between two adverſe claimants ii—518

9. Where a leaſe is expired, the tenant continues liable to the old rent, unleſs he deliver up complete poſſeſſion, or the landlord accepts another tenant; and ſuch rent is recoverable by action of *aſſumpſit* ii—518

10. Though rent be payable quarterly, it does not diſpenſe with the neceſſity of half a year's notice to quit: the landlord, however, by not expreſſing his diſſent thereto, and from other circumſtances, may be conſidered as having waved the want of a regular notice ii—519

11. But if a lodger goes away, without giving a regular notice to quit, the circumſtance of the landlord ſticking up a bill at the window, and endeavouring to let them, is no waiver of the want of regular notice ii—520, 1

12. If aſſignees of a bankrupt hold premiſes previouſly occupied by the bankrupt, they are only liable for the rent which accrues during their own time, even though they ſhould enter in the middle of a quarter ii—521

13. To recover rent in an action for uſe and occupation, it muſt appear that the occupation was beneficial; If, therefore, the owner of a wharf agrees with a perſon to ſell him the leaſe thereof, but miſrepreſents the duration of the term, and the perſon enters; but, in conſequence of the miſrepreſentation, the agreement is reſcinded, and poſſeſſion delivered up; no action will lie for rent during the time the perſon occupied the wharf ii 521

14. If lodgings are let for the purpoſes of proſtitution, no action lies for the rent ii—522

15. Where there is a note in writing, expreſſing the rent and the term, no parol evidence can be admitted to contradict it ii—522, 3

16. An executor cannot in one action declare for rent due to his teſtator, and alſo for rent due in his own right ii—523

17. It is a general rule, that a tenant cannot diſpute his landord's title in an action for uſe and occupation ii—523

18. He may, however, ſhow, that the party ſuing had only a temporary intereſt at the time of the demiſe, which has ſince expired ii—525

USURY.

See MONEY HAD AND RECEIVED—MONEY LENT.

1. By ſtatute 12 *Ann.* c. 16. Any contract, &c. made for the payment of money, whereby more than 5*l. per cent.* ſhall be received, ſhall be utterly void i—40

2. But this ſtatute does not apply to contracts made in foreign countries i—40
ii—144

3. So, every ſecurity given upon an uſurious contract, is void i—41
ii—143

4. But if a bill of exchange is given for a *bonâ fide* conſideration, uſury in any of the intermediate indorſements ſhall not avoid the bill in the hands of a *bonâ fide* indorſee i—41

5. In

5. In what caſe uſurious intereſt may be recovered back ii—113, &c.

6. If a loan of money be made to enable the borrower to purchaſe a parcel of goods, and he agrees to give the lender one half of the net profits which ſhall be made upon the re-ſale of the goods, and alſo gives him his note of hand for the principal, payable on demand, the lender cannot recover from the borrower a moiety of the profits, though this does not in ſtrictneſs amount to uſury ii—116

W.

WAGERS.

See MONEY HAD AND RECEIVED—POLICIES OF INSURANCE.

1. A wager on the event of a battle, is illegal and void i—36

2. But in general a wager is legal where the ſubject of it has no immediate tendency to a breach of the peace, or to affect the feelings or intereſt of a third perſon, and is not contrary to the principles of morality or ſound policy i—36,7 ii—486

3. A wager between two ſons, as to which of their fathers would die firſt, is legal ii—487

4. So, a wager that *A.* had purchaſed a waggon of *B.* is neither void at common law nor prohibited by the ſtatute ii—489

5. But a wager reſpecting the ſex of a perſon is illegal and void i—36 ii—490

6. It is not decided whether or no a wager concerning war or peace is illegal ii—493

7. But it has been held that a wager concerning the amount of any branch of the revenue is illegal i—493

8. So, a wager between two voters concerning the event of an election of a member to ſerve in parliament, is void ii—496

9. But a wager as to the event of a judicial determination, is legal ii—497

10. To entitle a party to recover money won upon a wager in the event of a *horſe-race*, it muſt be ſuch a race, and for ſuch a ſum, and between ſuch parties, &c. as are deſcribed in the ſtatute 13 *Geo.* 2. c. 19. ii—500 to 506

11. A foot race is a game within the ſtatute 9 *Ann.* c. 14., and therefore a wager laid on the event thereof is void ii—506,7

12. A wager upon the rules of a legal game is valid ii—506

13. Money fairly won at play, if under 10*l.* is recoverable by action of *aſſumpſit* ii—507

14. In what caſe money paid upon an illegal wager is recoverable back ii—20, &c.

WAGES.

See MASTER AND SERVANT—SEAMAN'S WAGES.

WAREHOUSEMAN.

1. A warehouſeman is only bound to take reaſonable and ordinary care of goods depoſited in his warehouſe ii—343

2 He is, however, liable for goods damaged, by reaſon of his ſlings breaking in the act of raiſing goods with the crane into his warehouſe ii—343

WARRANTY.

See SALES.

1. In contracts of ſales it is conſtantly underſtood that the ſeller undertakes that the commodity he ſells is his own; therefore when it proves otherwiſe an action lies againſt him for damages ii—263,4

2. The

2. The warranty must be *upon the sale*; for if it be made *after*, and not *at* the time of sale, it is not binding ii-264, 5

3. So, a warranty that a horse will be sound two years after the sale, it being sound at the time of sale, is void ii—264

4. Where a treaty for the sale of goods had been entirely broken off, a warranty then made does not extend to a subsequent sale of the same goods at a reduced price ii-265

5. If a person knowingly sell damaged goods as sound and marketable, he is liable to an action for this deceit; but if the seller, at the time of the sale, did not know that they were damaged, he is not liable without an express warranty, though he affirm them to be sound ii—265, 6

6. So, upon a sale of hops, with a warranty that the bulk of them answered the sample, the law will not raise an *implied* warranty that the commodity should be merchantable, though a fair merchantable price be given; and therefore if there be a latent defect in the bulk, unknown to the seller, he is not answerable; but if the sample answers fairly to the commodity in bulk, the warranty is satisfied ii-266, 7

7. So, in a sale of pictures, the mere putting down the name of an artist in a catalogue as the painter, does not amount to a warranty ii—272

8. But the seller of a ship is bound to disclose all latent defects known to him at the time of the sale ii—273

9. If, upon the sale of cattle, the the seller affirm them to be his own, when, in truth they are the property of another, an action lies against him, though there be not any express warranty ii—274

10. So, if a man sell cattle to another, and warrant them to be sound and good, &c. if they turn out to be lame, or diseased, an action lies upon this warranty ii—274

11. But no action lies unless there be an express warranty ii—274

12. So, a general warranty will not extend to guard against defects that are plainly the objects of one's senses ii-274, 5

13. So, a warranty that a horse is sound, is not falsified by its labouring under a temporary injury happening from an accident ii—275, 6

14. So, if a man not knowing the age of a horse, but having a written pedigree which he received with him sell him as a horse of the age stated in the pedigree, (at the same time showing the pedigree to the buyer,) this does not amount to a warranty ii—276, 7

15. If a horse is sold warranted sound, which is then unsound, the seller is liable to an action on the warranty, without the horse being returned, or notice given of the unsoundness ii—277

16. But where a warranty is accompanied with an undertaking, on the part of the seller, to take the horse again, and pay back the purchase-money, upon this condition, *viz.*, that if on the *trial* the horse shall be found to be unsound, the buyer must return the horse as soon as he discovers the unsoundness; the term trial in such case means a reasonable trial ii-279

17. So, where a horse is sold at a public auction, and one of the conditions of sale is, that a horse warranted sound must be returned within two days, otherwise he shall be deemed sound; if the horse be unsound, but the buyer neglects to return it within that period, no action lies on the warranty ii—280

18. But such a condition applies only to *soundness*, and not to the *age* of the horse ii—281

19. When

19. When cattle or goods, warranted ſound, are kept by the purchaſer without his offering to return them, he cannot ſet up unſoundneſs as a defence to an action for the price; his only remedy, in ſuch caſe, being by action upon the warranty ii – 282, 3

OF CONTRACTS OF WARRANTY OF TITLE, &c. UPON THE SALE OF LANDS, TITHES, ANNUITIES, &c.

1. If the vendor of an eſtate warrant that he has a good title, when in truth he has none, an action lies againſt him upon ſuch warranty ii—284

2. So, if he affirm the rent to be 30*l. per annum* whereas it is but 20*l.*, he is liable to an action ii—284

3. So, if a man ſell tithes, knowing that he as no right to them, an action lies for this deceit ii—285

4. But no action lies upon a mere affirmation of the vendor that he is proprietor of an eſtate of which he is not then in poſſeſſion, unleſs there be an expreſs covenant or warranty for the enjoyment ii—285

5. But where the grantor of an annuity has miſrepreſented the charges affecting an eſtate, intended to be charged with the annuity, ſo that a good title cannot be made to it, he is liable to an action for the expences of preparing the conveyances, &c. ii—285, 6

WHARFINGER.

See BAILMENT OF GOODS.

1. If the uſage of wharfingers, in the inſtance of goods to be carried coaſtways, is to deliver the goods on the wharf to the mate of the ſhip, the wharfinger's reſponſibility is at an end as ſoon as they are delivered to the mate, although the goods may be loſt from the wharf before they are ſhipped ii – 341

WITNESS.

See ASSIGNEE OF A BANKRUPT.

WORK AND LABOUR.

See SERVICES AND WORKS.

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